162 U.S. 329

RECORD, CASE No. 15,014.

162-329

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~1049.~~ ~~728~~ ~~388~~ 105

THE GREAT WESTERN TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

HIRAM PURDY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED APRIL 11, 1892.

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a Pleas before the supreme court of Iowa in a cause therein tried and determined, entitled—

THE GREAT WESTERN TELEGRAPH COMPANY, for the Use of ELIAS R. BOWEN, Receiver, Appellant,
vs.
HIRAM PURDAY, Appellee.

Be it remembered that on the 2d day of September, 1890, the plaintiff filed in the supreme court of Iowa a printed abstract of the record, the same, with endorsements thereon, being in the words and figures following, to wit:

1 In the Supreme Court of the State of Iowa, October Term, 1890.

THE GREAT WESTERN TELEGRAPH COMPANY, for the Use of ELIAS R. BOWEN, Receiver, Appellant,
vs.
HIRAM PURDY, Appellee.

Appeal from Des Moines county district court—Hon. Chas. H. Phelps, judge, presiding.

Newman & Blake and Thomas J. Sutherland, attorneys for appellant; S. L. Glasgow, attorney for appellee.

Abstract and Argument for Appellant.

2 On the 5th day of September, 1889, the plaintiff filed in the district court of Des Moines county its amended petition, stating its cause of action, as follows:

That plaintiff is a corporation incorporated and existing under the laws of the State of Illinois, and organized in 1867, and having a capital stock of $3,000,000, divided into shares of the par value of $25.00 each share; and the plaintiff being such corporation as aforesaid, the said defendant, Hiram Purdy, heretofore, to wit, on the 16th day of February, 1869, made and entered into an agreement in writing with the plaintiff to take 50 shares of the capital stock of plaintiff, and to pay for the same in the manner following, to wit: 5 per cent. of the par value thereof at the time of making said agreement and the balance of said par value thereof from time to time, as the directors of the plaintiff should order; and the defendant thereby, for a valuable consideration, undertook and promised to pay to the plaintiff for each and every of the said shares so subscribed for by him the sum of $25.00 in such installments and at such times as the defendant should be lawfully called upon and required to pay the same, and according to the tenor and legal effect of said agreement. A copy of said agreement is hereto attached and marked Exhibit "A" and made a part of this petition.

Plaintiff further avers that defendant has heretofore paid to plaintiff 5 per cent. of the par value of each of said shares so subscribed for by him, but has never paid to plaintiff any further or other sum

thereon, so that there was on and previous to the 10th day of July, 1886, a balance unpaid upon said shares of $1,187.50, which was then liable to be called for and ordered to be paid by virtue of the terms of said agreement.

Plaintiff further states that a large number of other persons subscribed for and agreed to take other shares of said capital stock, and thereby became, with defendant, stockholders of plaintiff, and they number more than 2,000 different persons, and are widely scattered and reside in more than twelve different States and Territories of the United States, and the names and residences of many of them are unknown to plaintiff; that the plaintiff avers that in pursuance of the purposes of its organization it proceeded to construct lines of telegraph and became greatly involved and indebted to sundry persons, and in 1874 it became unable to pay its indebtedness and suspended its business; that previous to the 10th day of July, 1886, it had become and was justly indebted to various and sundry persons to the extent of $400,000, which has never been paid; that the whole of said indebtedness accrued against the plaintiff subsequent to the making of said contract of subscription by defendant; that on the 10th day of July, 1886, and for a long time prior thereto, the plaintiff had no property, real or personal, with which to pay the said indebtedness or any part thereof except the amounts unpaid upon the shares of its capital stock subscribed for and agreed to be taken by the defendant and the other stockholders and subscribers.

3

Plaintiff further avers that a certain suit was begun on or about the 19th day of November, 1869, in the circuit court of Cook county, in the State of Illinois, in chancery, wherein one Jeremiah Terwilliger and certain other persons, stockholders of plaintiff, were complainants, including the defendant, Hiram Purdy, and this plaintiff and others were defendants, and which suit has been ever since its commencement and now is pending and undetermined in said court; that certain proceedings were therein afterwards had; that said circuit court did, on the 7th day of October, 1874, take jurisdiction and control of the plaintiff and its powers, property, and affairs and appoint a receiver for the plaintiff, and conferred upon him all the powers and duties usually granted and imposed upon receivers in such cases, and which order of appointment has never been revoked, vacated, or set aside and is still in full force; and the plaintiff avers that its business, powers, and duties and the powers and duties of the board of directors of the plaintiff have been thereby vested in and exercised, managed, and controlled by said court and said receiver at all times heretofore and from the time of said appointment, of all of which the said defendants had notice; that the said Elias R. Bowen is the receiver of the plaintiff appointed as aforesaid and has been such for many years continuously last past, and as such receiver is in possession of and entitled to receive the property and effects of the plaintiff. Plaintiff further avers that, having no means of payment of the said indebtedness except the unpaid subscriptions for its stock and due upon the same, it made application by petition and by and through

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its receiver, said Elias B. Bowen, to the said circuit court of Cook county, Illinois, in which the said suit of Jeremiah Terwilliger, said Hiram Purdy, and others against this plaintiff and others was pending, and in which said Bowen had previously been appointed receiver of plaintiff, asking the said court for an order on the stockholders severally to pay a portion of the unpaid balance due from them to said plaintiff upon the said subscriptions and for the payment of said indebtedness of the plaintiff; that said petition of said receiver was duly referred to a master in chancery of said court by an order of reference duly made on the 7th day of May, 1886, which directed said master, among other things, to take proof and examine into and ascertain the amount and nature of the indebtedness of the plaintiff and its assets, real and personal, and the value thereof, and as to the amount of the par value of the shares of the capital stock of the plaintiff, and what per centum of the par value of said shares should be required to be paid in order that sufficient might be collected to pay the said indebtedness, interest, costs, and expenses of collection, and which might be ordered paid by the court for the paying of such indebtedness, and to report his conclusions and recommendations; that said master took proof in the matters referred, and made his report to said court and certified to the said court the proofs, with his conclusions and recommendations, which report was heard by the court and duly confirmed, and the cause being heard upon said report, and the motion of said receiver, the said court then and there and therein made and entered a decree, to wit, on the 10th day of July, 1886, directing and ordering said receiver to demand and collect from the defendant and the other of said stockholders an assessment of 35 per cent. upon the stock and stockholders of the plaintiff, being $8.75 on each and every share thereof; that the said defendant, Hiram Purdy, was a party plaintiff in said suit and action in chancery, and was fully advised of said proceeding and decree of assessment and bound thereby; that on the 29th day of August, 1888, demand was made upon said defendant, Purdy, for the amount of said assessments as against him so made, to wit, in the sum of $437.50, and the payment neglected, and said sum is still due and unpaid, with interest thereon. A copy of said decree and assessment so made is hereto attached and marked Exhibit "B" and made part hereof. Plaintiff therefore demands judgment for $437.50, with interest thereon, at six per cent., from the 10th day of July, 1886, and costs of suits.

EXHIBIT "A."

Copy of Contract of Subscription.

"Capital, $3,000,000; shares, $25; assessments not to exceed $10 on a share.

"*Subscription List for the Capital Stock of the Great Western Telegraph Company.*

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of the Great Western Telegraph Company placed opposite our respective names, and pay for the same in installments, to wit:
6 5 per cent. on amount paid in, and the balance as the directors from time to time may order; in consideration thereof the Great Western Telegraph Company agree that when forty per cent. of the par value of the shares shall have been paid under such orders, and the installment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full-paid stock by the said company.

"T. C. Snow is appointed agent to solicit stock and receive only the first installment of five per cent. (fifty cents on a share) at the time of subscription.

"J. SNOW, *Secretary.*

Names.	Residence.	Date of subscription.	No. of shares.
"Hiram Purdy.	Burlington, Iowa.	Feb. 16, 1869.	Fifty (50)."

EXHIBIT "B."

Copy of Decree of Assessment.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 21st day) of June, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

Present: Honorable Murray F. Tuley, on of the judges of the circuit court of Cook county, State of Illinois.

JULIUS S. GRINNELL,
State's Attorney.
SETH F. HANCHETT, *Sheriff.*

Attest: HENRY BEST, *Clerk.*

Be it remembered that at the term aforesaid, to wit, on the 10th day of July, A. D. 1886, the following, among other, proceedings were had and entered of record in said court, to wit:

JEREMIAH TERWILLIGER, NELSON WHEELER, G. B. Schrueben, Thomas C. Haines, W. B. Harford, G. W. Baker, A. C. Kellog, Charles Snider, John Eshelman, D. P. Stubs, Samuel C. Farmer, John D. Smock, J. D. Jones, Geo. A. Wells, Timothy Whiting, Hiram Purdy, James B. Shaw, Thomas Hedges, H. W. Templeton, Charles E. Starr, O. H. Shank, W. H. Hatch, W. H. Ludam, *et al.*, E. W. Rand, E. L. Hill, A. Delahage, Evan & Alanson Hill, Chester Henderson, and Albert Bickford — Bill.

vs.

THE GREAT WESTERN TELEGRAPH COMPANY, DAVID A. GAGE, JOSIAH SNOW, and SELAH REEVE

and

J. M. W. JONES and JOHN J. BENNETT, of Cook County; Anthony W. Street, of Council Bluffs, Iowa, and Alexander Street, of Nebraska City, Nebraska, and Monroe L. Hayward — Supplemental Bill.

vs.

JOSHUA STARK, ABEL H. BLISS, B. F. ALLEN, and Orville D. Bond, Impleaded with the Great Western Telegraph Company,

and

SELAH REEVE

vs.

THE GREAT WESTERN TELEGRAPH COMPANY, JEREMIAH TERWILLIGER, NELSON WHEELER, G. B. Schrueben, Thomas C. Haines, W. B. Harford, G. W. Baker, A. C. Kellog, Charles Snider, John Eshelman, D. P. Stubs, Samuel C. Farmer, John D. Smock, J. D. Jones, Geo. A. Wells, Timothy Whiting, Hiram Purdy, James B. Shaw, Thomas Hedges, H. W. Templeton, Charles E. Starr, A. Delahage, Evan Hill, Alanson Hill, Chester Henderson, W. H. Ludam, E. W. Rand, O. H. Shank, W. H. Hatch, E. L. Hill, and Albert Bickford. — Cross-Bill.

This cause heretofore and in pursuance of the petition of Elias R Bowen, receiver of the Great Western Telegraph Company, one of the parties hereto, praying the court, among other things, for an order on the stockholders of said company severally to pay a portion of the unpaid balances or amounts due from them to said company for the payment of the debts of the company, having been referred to Horatio L. Wait, one of the masters in chancery of this court, by

an order of reference duly made and entered herein on the
8 seventh (7) day of May, A. D. 1886, which said order of reference directed the said master, among other things, to take proofs upon and to examine into and enquire as to the amount and nature of the present indebtedness of said company and as to the assets or property, real or personal, of said company and the amount and value thereof that can or may be applied in payment of such indebtedness, and as to the amount or per centum or portion of the par value of the shares of the capital stock of said company subscribed for or held by its stockholders each of them should be required to pay and is necessary to be paid by them respectively in order that sufficient may thereby be collected to pay and sati-fy the said indebtedness, including interest, costs, and also expenses of collection, and also generally as to the organization of said company, and as to the present residences of such stockholders, and also as to the labor and expense of collecting the portions of the unpaid balances upon the stock of said company, and as to the stock of said company subscribed for or held by them which might be ordered paid by the court for the purpose of paying such indebtedness, and to report his conclusions and recommendations as to such matters to this court;

And the said master having done as he was ordered in and by the said order of reference and having taken proofs as to said matters and having made his report therein to this court and filed the same with the clerk of this court on the 29th day of June, A. D. 1886, and in and by said report having reported and certified to the court the said proofs and evidence, together with his findings as to said matters and his conclusions and recommendations concerning the same;

And this cause having also heretofore on the 29th day of June, A. D. 1886, come on to be heard upon the said report and the matters therein contained and the motion of the said receiver that the same be confirmed by this court and that this court order the stockholders of said company and each of them severally to pay a certain per centum or portion of the par value of the shares of the capital stock of said company subscribed for or held by them to enable this court to pay and satisfy the just debts and liabilities of said company; and the court, having then examined the said report and the matters therein contained and being then fully advised con-
cerning the same and having then heard the arguments of
9 counsel, did then find, declare, adjudge, and decree that the said report and all things therein contained were true, and that the same be and remain confirmed from and after the said 29th day of June, A. D. 1886, unless objections thereto should be filed within ten (10) days thereafter.

And this cause now again coming on to be heard upon the said report and the said motion of the said receiver, and it appearing to the court that no objections to said report have heretofore and within the said ten days been filed, therefore the court doth adjudge and decree that the said report is in all things confirmed.

And the court doth find from an examination of the said report

and the matters therein contained and the records of this cause, and it does thereby appear to the court as follows: That the said company is a corporation and was organized in the year 1867 under and by virtue of a law of the State of Illinois providing for the establishment of telegraphs, which was enacted and went into effect in the year 1849; that this cause was commenced in the year 1869 against said company and certain other persons, who were each duly served with process and appeared in person and by counsel, and has been ever since and is now pending and undetermined in this court; that a receiver was appointed herein of the said company and its property, both real and personal, on the seventh (7th) day of October, A. D. 1874, upon supplemental bill of complaint filed herein, and an account of the mismanagement and malfeasance of the then officers of said company, and as alleged and set forth in said supplemental bill, and as well by stipulation and consent of all parties hereto, including the said company, and which receivership has never since been discontinued; that the said company is largely indebted, and to the extent of more than three hundred and seventy-five thousand dollars ($375,000), and which indebtedness is in the form of judgments and decrees heretofore rendered against said company; that about two-thirds (⅔) of such indebtedness accrued against said company and was created previous to the first (1st) day of September, A. D. 1872, and on account of the construction of its telegraph lines and other property and material furnished and labor performed and money advanced in and about such construction and in and about the operation of the lines of said company;

That a large portion of this two-thirds of said indebtedness is for money borrowed by said company and which was used by it in the construction and operation of its lines; that this court has heretofore, by references had for that purpose in this cause, determined and found the entire indebtedness of said company and the name of each creditor thereof and the amount due each, as appears by the records in this cause; that each and all of said creditors did, under the orders of this court herein, make proofs before this court of their several claims, judgments, and decrees against said company, and did thereby make themselves parties to this cause; that all of the property of said company has been heretofore sold and disposed of under the orders of this court herein, subsequent to the said appointment of the receiver, and the proceeds therefrom distributed to the creditors of said company; that the said company has now no property, real or personal, except as hereinafter stated, with which the said indebtedness or any part thereof can be paid; that the only means or resources that the said company now has for the payment of said indebtedness are the balances and amount now remaining unpaid and due from its stockholders upon their several subscriptions to its capital stock and the amounts unpaid upon the capital stock of said company; that there are about two thousand stockholders of said company who are widely scattered through more than twelve (12) different States and Territories of the United States and in other places, and the larger portion of whom live at great distances

from the place of the holding of this court and from this county, while the residences of many of them are entirely unknown to the receiver or his solicitor, although diligent inquiry has been made by them in reference thereto, and it is therefore impracticable that all of the said stockholders should be made parties to this proceeding; that the subscriptions to the shares of said capital stock were made principally in the years 1868, 1869, 1870, and 1871; that many of the stockholders of said company have become insolvent or have died since their subscriptions were made; that a few of said stockholders have paid the full par value of the shares of said stock subscribed for or held by them, namely, the sum of twenty-five dollars on each and every share thereof; that some of said stockholders have paid forty per cent. of such par value, or ten dollars ($10.00) on each share; that many of said stockholders have only paid fifty cents upon each share subscribed for or held by them; that all of said stockholders, excepting those
11 who have paid twenty-five dollars ($25.00) upon each of the shares subscribed for or held by them respectively, now owe and are liable to said company for an unpaid balance upon their several subscriptions to such stock of not less than fifteen dollars ($15.00) on each share, or sixty per centum of the par value thereof, and that many of them owe thereon much more than sixty per centum of the par value thereof; that the liability of said stockholders to said company is based upon and controlled by contracts of subscription made with said company, and in and by which contracts the said stockholders agreed to take the number of shares subscribed for by them and pay for the same in installments as follows: Five per centum of the par value thereof at the time of the making of their respective subscriptions therefor, and the balance of said par value as the directors of said company from time to time should order; that said stockholders who have not paid in full, as aforesaid, are severally liable to said company for the balances now unpaid upon the shares of said stock subscribed for or held by them, being the difference between the amounts actually paid thereon and the par value thereof; that the said unpaid balances still remain liable to be called for and ordered and required to be paid by the said subscribers and stockholders and their assigns; that the collection of whatever sums are required to be paid by said stockholders in order to pay the said indebtedness is likely to be attended with great difficulty, labor, and expense; that it is therefore necessary and proper that thirty-five per centum (35%) of the par value of each share of said capital stock subscribed for or held by said stockholders and not paid for in full should be called for and required to be paid by them and their assigns for the purpose of paying the said indebtedness.

And the court doth therefore order, adjudge, and decree, and it is hereby ordered, adjudged, and decreed by the court, that a call or assessment be, and the same is hereby, made upon the stock and stockholders of the said company (excepting those who have paid in full), their legal heirs, representatives, and assigns, of thirty-five per centum of the par value of the shares of said stock subscribed for

or held by them, being eight dollars and seventy-five cents ($8.75) on each and every share thereof, and that the stockholders of said company and each and every one of them (excepting those
12 who have paid twenty-five dollars on each and every share subscribed for or held by them) and their heirs, legal representatives, and assigns, be, and they hereby are, severally ordered and required to pay to the receiver of said company, the said Elias R. Bowen, the several amounts by this decree called for and assessed and required to be paid, namely, eight dollars and seventy-five cents ($8.75) on each and every share subscribed for or held by them respectively, and that the same be paid upon the demand of said receiver or his agent.

It is further hereby ordered that said receiver shall at once proceed to collect the said sums so ordered paid by this decree, and shall make all necessary demands for such payments, shall employ such assistance and counsel, take such action, and institute such suits and proceedings in the name of the said company and in such jurisdictions as he shall be advised or deem expedient and proper, and for the purpose of enforcing the payment of the sums hereby ordered paid.

STATE OF ILLINOIS, } *ss:*
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a certain decree made and entered of record on the 10th day of July, A. D. 1886, in a certain cause lately pending in said court, on the chancery side thereof, between J. Terwilliger *et al.*, complainants, and The Great Western Telegraph Company *et al.*, defendants.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, in said county, this 21st day of July, 1886.

HENRY BEST, *Clerk.*

Answer.

On November 1st, 1889, the defendant filed the following answer:

1. Defendant denies that he is indebted to plaintiff in any sum upon the alleged subscription or otherwise; denies that the
13 said suit of Terwilliger *et al. vs.* the plaintiff is still pending or was pending at the date of the alleged appointment of the receiver for plaintiff, October 7th, 1874; denies that the said cause was pending on July 10, 1886; denies that he was a party to said suit at the time of the assessment; denies that at the date of his alleged subscription the plaintiff owned or controlled any stock that it could sell; denies every allegation in the amended petition.

2. Defendant admits he signed an instrument purporting to be a subscription to the stock of plaintiff, similar to Exhibit "A,"

but does not know if Exhibit "A" is a true copy; avers that the plaintiff was organized in December, 1867, in the State of Illinois under a law of that State, but avers that the said organization was fraudulent; that at the time of its organization all of its stock was subscribed for by the incorporators, and that at the time of the defendant's alleged subscription, on February 16th, 1869, the plaintiff had no stock subject to subscription, and that therefore defendant's alleged subscription was and is void.

3. Avers that on the 25th of March, 1868, Reeve, one of the incorporators, and the plaintiff entered into a written contract, by which Reeve assigned to one Snow one hundred and seventeen thousand eight hundred and ninety-seven shares of the stock, and which he had originally subscribed for, in trust to sell the same at $10 a share and pay over the proceeds to said Reeve; that said Snow requested defendant to subscribe to such stock and represented to defendant that he was the agent of said plaintiff to take subscriptions to the stock of plaintiff, and defendant, relying on such representations, subscribed for fifty shares of said stock February 16th, 1869, at Burlington, Iowa; avers that such representations were false, and that the said stock was the stock of said Reeve, so assigned to Snow as aforesaid; that said stock was the stock of said Reeve and as between the defendant and plaintiff is fully paid up stock and no liability exists thereon against defendant and in favor of plaintiff.

14 4. Defendant avers that the entire scheme of the organization of the plaintiff and the said contract of March 25, 1868, and the sale of said stock to defendant were fraudulent; that defendant has paid on said subscription the sum of $275.00.

5. Defendant avers that he was not a party to the said supplemental bill and was not a party to said cause of Terwilliger *et al. vs.* the plaintiff and others, in which the order of assessment was made, and he had no notice of said suit; that defendant had no notice of the application for said order of assessment.

6. Defendant says that prior to the commencement of this action all questions then involved were finally adjudicated by the decree of the United States circuit court for the southern district of Iowa in the cause of plaintiff and others as. W. H. Anderson, this defendant, and others, No. 1967, equity, entered October 28th, 1885.

7. Defendant avers that this action was commenced on the 30th day of August, 1888; that, as alleged in plaintiff's petition, the plaintiff company became insolvent and ceased to do or carry on its business October 7th, 1874, and that at the last-mentioned time the receiver was appointed; that on or about the 5th day of June, 1872, the then board of directors of the plaintiff duly ordered that each holder of stock of plaintiff pay to said company on or before the 12th day of July, 1872, all unpaid balances due to said plaintiff, as provided by the terms of the contract of subscription, and that the secretary of the plaintiff notify the said subscribers of said order and demand payment; that said order was then and there duly entered of record on the books of the plaintiff; that plaintiff's alleged cause of action, if any, *occurred* more than ten years prior to the com-

mencement of this action; that plaintiff's alleged action, if any, is barred by the statute of limitations.

8. That the said receiver has been enjoined in the case of Farwell *et al. vs.* the plaintiff *et al.*, now pending in the circuit
15 court of Cook county, Illinois, from collecting the alleged assessment.

Amendment to Petition.

On January 13, 1890, plaintiff filed its amendment to its amended petition as follows:

Plaintiff amends its petition filed September 5, 1889, by adding the following averments: At the end of the middle paragraph of page two of amended petition after the words "terms of said agreement" add "except the sum of about $250, paid by defendant to plaintiff under an assessment decree of October 16th, 1879, duly entered in said cause of Terwilliger, Purdy, *et al. vs.* the plaintiff *et al.*, and being prior to the one under which the plaintiff now claims." Plaintiff also further amends by striking out the words "suspended business" and substituting therefor the following: "Its business and management passed into the hands of a receiver appointed by the said circuit court on account of alleged mismanagement as averred in the supplemental bill in the Terwilliger case above referred to and filed in said cause, and the plaintiff continued business until succeeded by said receiver October 7th, 1874, under whom the plaintiff's business was continued until 1880." Plaintiff also amends by adding the further averment as follows, to wit: "That all the proceedings referred to in the amended petition were in the said case entitled Jeremiah Terwilliger, Hiram Purdy, *et al. vs.* the plaintiff, now pending in the circuit court of Cook county, Illinois, in which case is included the supplemental and cross bill filed in said cause. Plaintiff further avers that Elias R. Bowen, the receiver of the plaintiff, filed his petition and motion in the aforesaid cause, upon which the assessment of 35 per cent. on the stockholders of plaintiff was assessed upon the stock, as will more fully appear by Exhibits "A" and "B," attached to plaintiff's amended petition and now made part hereof.

16 *Answer to Amendment to Petition.*

That afterwards and on March 1st, 1890, the defendant filed in said court and in said cause his answer to the amendment to plaintiff's petition, which is as follows:

Defendant denies that he paid the sum of $250 under assessment decree of October 16, 1879; denies that he ever paid anything upon his alleged subscription after he became a party to the case of Terwilliger and others against the plaintiff and others, which was some time in the year 1869; denies that said cause was pending in 1879; denies that the said supplemental and cross bills were filed in said cause or that the said cause was pending at the date of this filing; denies that the receiver filed his petition in said cause for the alleged assessment and denies that the said cause was then pending.

Defendant avers that said cause was finally determined on the 16th day of November, 1872, when a final decree was rendered in said cause in conformity with the opinion of the supreme court of Illinois, and for costs against the defendant in said action, and execution awarded thereon, which was paid January 7th, 1873; that at the date last mentioned said cause was finally determined and disposed of so far as the rights of complainants, including this defendant, were concerned.

Defendant avers that it is provided by the laws of Illinois, which were in force July 1, 1872, as follows (sets forth section 25 of the incorporation act of 1872 of the State of Illinois); that said act was in full force and effect when said receiver was appointed and said assessment order was made; that under said act it was necessary to make this defendant a party to said proceedings in order to render him liable thereby; that this defendant was not a party to the same and had no notice of the proceedings, and defendant avers that he is not concluded nor bound thereby.

17 *Replication.*

Plaintiff filed its replication denying every allegation in answers except as consistent with petition and amendments thereto.

Trial and Evidence.

This cause came on for hearing before the court without a jury, a jury being waived, on the 4th day of March, 1890, and the following evidence was introduced on behalf of the plaintiff:

Plaintiff introduced the original contract of subscription of the defendant with the plaintiff. This is like Exhibit "A," attached to plaintiff's petition and hereinbefore set out.

THOMAS J. SUTHERLAND, sworn, testified: Is attorney for the receiver of plaintiff; been connected with the litigation since the appointment of the receiver, in 1874. The book I hold is one of the subscription books to the stock of plaintiff. The contract at the commencement of the book is as follows: (The same as Exhibit "A.") Under this is Hiram Purdy; residence, Burlington, Iowa; date, February 16, 1869; fifty shares. That is the contract, a copy of which is attached to plaintiff's petition.

Plaintiff introduced in evidence a certified copy of the original decree of assessment of July 10th, 1886 (a copy of this is hereinbefore set forth as Exhibit "B," attached to the petition); also introduced in evidence a demand made upon the defendant the 29th day of August, 1888, for the payment of the assessment of $8.75 on 50 shares of stock in the plaintiff company, amounting to $437.50, and which is in the words and figures following, to wit:

18 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

JEREMIAH TERWILLIGER *et al.* } In Chancery. Gen. No., 4884.
vs. } Bill, Supplemental Bill, and
THE GREAT WESTERN TELEGRAPH COMPANY *et al.* } Cross-Bill.

To Hiram Purdy, a stockholder of the Great Western Telegraph Company:

Take notice that by the terms of two certain decrees of the circuit court of Cook county, Illinois, made and entered of record on the 10th day of July, A. D. 1886, and the 10th day of January, A. D. 1888, respectively, and in a certain cause then and now pending and undetermined in said court, and wherein Jeremiah Terwilliger and others are complainants and The Great Western Telegraph Company and others are defendants, the subscribers to the capital stock of said company and the stockholders thereof, their heirs, representatives, and assigns (excepting those who have paid $25.00 on each share), were severally ordered to pay to me, the undersigned, Elias R. Bowen, the receiver of said company, upon my demand the sum of eight dollars and seventy-five cents ($8.75) upon each and every share of said stock subscribed for or held by them respectively, being thirty-five per centum (35%) of the par value thereof, for the purpose of paying the indebtedness of said company as found and determined by said court in said cause.

Now, therefore, in pursuance of said decrees and the various provisions therein contained, I do hereby demand that you at once pay to me or Newman & Blake, my attorneys, the sum of eight dollars and seventy-five cents ($8.75) upon each and every share of said stock subscribed for or held by you (being 50 shares), and which amounts, as I compute it, to a sum total of $437.50. I have in my possession reliable information and evidence that you are a stockholder of said company and subscribed for 50 shares of its capital stock.

19 You are also notified that compliance with this demand may be made by paying the said money hereby demanded to Thomas J. Sutherland, the receiver's solicitor, at his office, room 23, 184 Dearborn street, in said city, who has full power to receive the same and give receipt.

Burlington, Iowa, Aug 28th, A. D. 1888.

ELIAS R. BOWEN,
Receiver of the Great Western Telegraph Company,
Room 16, 170 *Madison Street, Chicago, Ill.*

NEWMAN & BLAKE,
Att'ys for Receiver.

(Endorsed on back:)

STATE OF IOWA, }
Des Moines County. }

Rec'd the within notice on the 29th day of Aug., 1888, and on same day served the within notice by reading to Hiram Purdy, def't, and delivered to him personally a copy of the within notice at his usual place of business in Burlington, Des Moines county, Iowa.

N. FULLERTON, *Sheriff*,
By W. J. CUNNINGHAM, *Deputy*.

Service	.50
Mileage	.10
Copy	.25
	.85

Counsel for defendant admits that the demand was made on the date named according to its purport and affidavit of service and its sufficiency, and makes no objection to proof of signature or manner of service.

Plaintiff also introduced in evidence the opinion of the supreme court of Illinois in the case of Jeremiah Terwilliger *et al. vs.* The Great Western Telegraph Company *et al.*, reported in 59 Ill., p. 249 to 261. (This will be found in full in the volume of reports referred to.)

Plaintiff also introduced in evidence a copy of the decree of the circuit court of Cook county, Illinois, made and entered on the 16th day of November, 1872, in the same case, which is as follows:

20 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Pleas before the honorable the judges of the circuit court of Cook county at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the twenty-first day) of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

Present: Honorable Erastus S. Williams, chief justice of the circuit court of Cook county, State of Illinois; W. W. Farwell, Henry Booth, John G. Rogers, Lambert Tree, judges; Timothy M. Bradley, sheriff.

Attest: NORMAN T. GASSETTE, *Clerk*.

Be it remembered that at the term aforesaid, to wit, on the 16th day of November, A. D. 1872, the following, among other, proceedings were had and entered of record in said court, to wit:

The judgment mentioned in this decree ag'st def'ts satisfied by return of execution No. 774.
JACOB GROSS, *Clk.*

JEREMIAH TERWILLIGER, NELSON WHEELER, G. B. Schruben, Thomas C. Haines, W. B. Harford, G. W. Baker, A. C. Kellogg, Charles Snider, John Eshelman, D. P. Stubbs, Samuel C. Farmer, John D. Smock, J. D. Jones, Geo. A. Wells, Timothy Whiting, Hiram Purdy, James B. Shaw, Thomas Hedges, H. W. Templeton, Charles E. Starr, O. H. Shank, W. H. Hatch, W. H. Ludam *et al.*, E. W. Rand, E. L. Hill, A. Delahage, Evan and Elanson Hill, Chester Henderson, and Albert Bickford	4884.
vs.	
THE GREAT WESTERN TELEGRAPH COMPANY, David A. Gage, Josiah Snow, and Selah Reeve.	

21 The bill in this cause having been filed by the complainant Jeremiah Terwilliger on behalf of himself and all other persons who should come in and be made parties complainant to said suit, and the other complainants above named having filed their respective petitions and having been made parties complainant, which bill was filed, among other things, to declare certain contracts between Selah Reeve and the Great Western Telegraph Company fraudulent and to set the same aside and to compel the said Selah Reeve to account for and pay over to the said Great Western Telegraph Company the moneys he had received for building certain telegraph lines over and above the actual cost thereof mentioned in said contracts and for specific performance and for other and for further relief, and the cause having been heard by the said circuit court of Cook county on the 27th day of March, A. D. 1871, at the March term of said court, 1871, upon the pleadings and proofs taken in said cause, and the said court having decreed the specific performance prayed for in said bill of complaint, and having denied all the other relief prayed for in said bill and dismissed the said bill as against David A. Gage, and the said complainants having appealed from the decision and judgment of the said circuit court to the supreme court of the State of Illinois, and the said supreme court having at the September term of said court, A. D. 1871, diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and thereupon the said supreme court ordered and adjudged that the judgment aforesaid in said circuit court of Cook county be reversed, annulled, and set aside and held for nothing, and did by its judgment order the said cause to be remanded to the circuit court of Cook county with directions to the said circuit court to enter a decree therein as hereinafter stated;

And the certificate of remander of the said supreme court and the opinion and decision of said court having been filed in this court—

And now, on this 16th day of November, A. D. 1872, at the October term of this court, it is by this court, in pursuance of the decision, directions, order, and judgment of the said supreme court, ordered,

adjudged, and decreed, after hearing E. Van Buren, of counsel for complainants, and Messrs. Doolittle and Norton and Gookins
22 and Roberts, of counsel for the defendants, that the decree heretofore entered in this court in this cause be, and is hereby, reversed, set aside, and held for naught.

It is further ordered, adjudged, and decreed that the written contract made and entered into by Selah Reeve, of the one part, and the Great Western Telegraph Company, through David A. Gage, as president of said company, of the other part, for the construction by said Reeve of two thousand miles of telegraph lines, dated the 25th day of March, A. D. 1868, and all the other contracts between the said company and the said Selah Reeve are hereby set aside and declared to be void and held for nothing.

It is further ordered, adjudged, and decreed that it be referred to Hiram M. Chase, one of the masters of this court, to ascertain what amount of money has been paid by the subscribers of stock of the said Great Western Telegraph Company, with the name and place of residence of each of such subscribers and the time when such subscription was made by each of such subscribers and the amount of money paid by each of such subscribers for stock in said company, and report the evidence with his opinion thereon to this court.

It is further ordered, adjudged, and decreed that the costs and expenses of such reference be paid by the present officers of said telegraph company, to wit, the president and secretary of said company, and the said president and secretary are hereby directed to pay the same.

It is further ordered, adjudged, and decreed that the said Great Western Telegraph Company, by and through its officers as now organized, shall issue certificates of stock to all such subscribers who have paid their money on such subscriptions for stock for as many shares as they are entitled to by the money paid, reckoning forty per cent. paid upon twenty-five dollars as giving title to a share.

It is further ordered, adjudged, and decreed that the president and secretary of the Great Western Telegraph Company shall, and they are hereby, directed to call a meeting for an election of a new board of directors by such stockholders, which election shall be held at the principal office of the Great Western Telegraph Company, in Chicago, on the last Tuesday in January, A. D. 1873.

And the said president and secretary shall give notice to
23 the stockholders of such new election to be held, specifying the time and place either in writing or by a printed notice, which notice shall be served by putting the same in an envelope directed to the place of residence of each stockholder and subscriber for stock so far as the said president and secretary can ascertain the same, deposit the same in the post office at Chicago, and pay the postage thereon at least 20 days before the time of holding such election, and the president and secretary shall make an affidavit of such service at or before the time of such election and file the same with the papers of said company; the said president and secretary shall also cause to be published such notice in the Chicago Tribune and Chi-

cago Times daily for six weeks consecutively previous to such election.

It is further ordered, adjudged, and decreed that at such election for new directors only the holders of actual stock subscribed for and paid for will be allowed to vote and such as shall have been found by this court to be proper voters after the coming in of the master's report.

It is further ordered, adjudged, and decreed that, unless such newly elected board of directors shall make an amicable settlement with Selah Reeve and one satisfactory to this court, this court will ascertain as nearly as possible the cost of the telegraph lines constructed by him, said Selah Reeve, and, after allowing him such costs and reasonable compensation for his time and labor, will enter a decree against him, said Selah Reeve, for any excess of money he may have received from the said telegraph company to be paid to the treasurer appointed by the new board of directors.

It is further ordered, adjudged, and decreed and the president and secretary of the Great Western Telegraph Company are hereby ordered and directed to produce all books and papers that may be required by the master in chancery or before the court in this case whenever they shall be required, and if the above-named officers or the Great Western Telegraph Company as now organized shall interpose any obstacles or difficulties in the way of carrying the orders of this court into execution this court will appoint a receiver to take charge of books, papers, offices, and business of the Great Western Telegraph Company, requiring such bonds as are necessary.

It is further ordered, adjudged, and decreed that the complainants are at liberty at any time to apply to this court for
24 such further order or decree, at the foot of this decree, as shall be necessary to carry out this decree or as shall be necessary in this cause.

It is further ordered, adjudged, and decreed that the defendants David A. Gage, Josiah Snow, and Selah Reeve pay the costs of this suit, to be taxed, and that the complainants have execution therefor.

To the entering of which decree the complainants, by their solicitor, excepted to so much of such decree as strikes out the words "in money" after the words "subscribed for and paid for in relation to the election."

Also introduced copy of decree entered January 28th, 1873, in the same case, which is as follows:

And afterwards, to wit, on the 28th day of January, A. D. 1873, the following, among other, proceedings were had and entered of record in said court, to wit:

Orders, Jan. 28, '73.

JEREMIAH TERWILLIGER *et al.*
vs.
THE GREAT WESTERN TELEGRAPH COMPANY *et al.* } 4884, 750. Bill.

The master's report made in this cause in pursuance of the decree of this court having been filed in this cause this day, and exceptions thereto having been filed by S. B. Gookins, Selah Reeve, Jesse O. Norton, and James R. Doolittle to said report, and the same having been argued by E. Van Buren for complainants and S. B. Gookins, Esq., James R. Doolittle, and Jesse O. Norton on behalf of said defendants—

It is ordered that the said exceptions and each of them be overruled.

And after hearing counsel for complainants and defendants it is ordered, adjudged, and decreed that the master's report in this cause be, and the same is hereby, confirmed.

Also introduced copy of another order entered on same date in same case:

25 JEREMIAH TERWILLIGER *et al.*
vs.
THE GREAT WESTERN TELEGRAPH COMPANY *et al.* } 4884, 750. Bill.

It is ordered that at the election of directors all *bona fide* holders of stock of the stock of the Great Western Telegraph Company which has been actually paid for shall be entitled to vote.

It is further ordered that the meeting of stockholders may, if deemed necessary by said stockholders, be adjourned from time to time to enable all *bona fide* stockholders to vote upon their stock at said election.

To all of which the complainants, by their solicitor, now here except*s*.

D. P. Stubs testified as follows: The certificate for some of the stock of the plaintiff which was issued to the defendant was last in my possession at Fairfield, in Iowa, in 1885. At that time I had the certificate in my posssesion. It is now lost. It was one of the regular certificates of the company issued to Hiram Purdy, I think for 27½ shares. That is my recollection. I took the certificate from the secretary of the company in 1873, after the decree. Mr. Purdy gave me authority to get that certificate. I had his receipts with me for money to the company to surrender. The secretary had the stock book present and issued us stock—issued stock to every person that showed receipts for payment of money, and the certificates of stock was issued to them. I surrendered receipts showing that Mr. Purdy had paid to the company $275.00. I was attorney at the time for Purdy in the Terwilliger suit. Purdy was a party to that suit. My receipt for the certificate is on the book: "27½ shares, Jan. 29, 1873. Received the above stock, D. P. Stubs."

I now hand the reporter a blank certificate corresponding with the one issued by the Great Western Telegraph Company to
26 Hiram Purdy, filled in 27½ shares, and dated on the 29th day of January, 1873, as being a copy of the one delivered to me for Hiram Purdy. Filled in, it reads as follows:

No. —. — Shares.

The Great Western Telegraph Company.

Capital $3,000,000. Shares $25 each.

This certifies that Hiram Purdy is entitled to 27½ shares in the capital stock of the Great Western Telegraph Company, transferable in person or by attorney on the books of said company in Chicago upon the surrender of this certificate, according to the provisions of the act of incorporation and by-laws (Stamp.) of the company.

Witness the signature of the president and treasurer and the corporate seal of the company at their office in Chicago this 29 day of Jan'y, 1873.

[SEAL.]

J. R. DOOLITTLE, *Sec.* DAVID A. GAGE, *Pres't.*

I was acting attorney for Hiram Purdy when I received the certificate.

Plaintiff rests, and defendant introduces the following evidence:

Certified Copy of the Articles of Incorporation of the Plaintiff.

STATE OF ILLINOIS, } *ss:*
City of Chicago, Cook County, }

Whereas the subscribers hereunto having united and associated for the purpose of constructing, owning, using, and maintaining the several lines of telegraph hereafter to be constructed, leased, and used by the Great Western Telegraph Company, with branches either wholly within the limits of the State of Illinois or partly or wholly beyond the limits thereof, in pursuance of the act of the legislature of the State of Illinois passed February 9, 1849, as contained in the authorized edition of the Statutes of Illinois for 1863, page 1175:

27 We hereby make, sign, and acknowledge the certificate following, to wit: This is to certify, first, that the corporate name assumed by said association and to be used in its dealings is the Great Western Telegraph Company.

Second. That the general routes of the lines of said company and the points thereby connected or to be connected are as follows, viz: Commencing at Chicago and building therefrom along the line of the different divisions of the Northwestern railroad from said city to the city of Galena or on the public highways contiguous thereto through Elgin, Belvedere, Rockford, Freeport, Crystal Lake, Janesville, Warren, and other places on the lines of said railroad or on

the public highways contiguous thereto; also from Rockford through Beloit, Janesville, Milton, Watertown, Burnett, Fond du Lac, Oshkosh, to Green Bay, with branches to Milwaukee, Racine, Kenosha, Madison, La Crosse, Prairie du Chien, and other places or on the public highways contiguous thereto; also on the line of the Rock Island railroad to Rock Island or on the public highways contiguous thereto, through Joliet, Ottawa, La Salle, Bureau, and Geneseo, to Rock Island; also commencing at Rockford and running to Dixon, Mendota, La Salle, Bureau, Peoria, Jacksonville, Springfield, Decatur, and St. Louis, with branches from said line to Quincy, Keokuk, Burlington, Clinton, Dunleith, or on the public highways contiguous thereto; also from Chicago on the line of the Chicago, Burlington and Quincy railroad or on the public highways contiguous thereto, through Mendota, Kewanee, Galesburg, and Bushnell, to Quincy, with branches; also commencing at Chicago and running along the line of the Illinois Central Branch railroad or on the public highways contiguous thereto and running through Kankakee, Gilman, Rantoul, Tolono, Mattoon, Centralia, thence to Cairo, with branches, and to all and through all the principal cities and towns throughout the Northwestern States.

Third. The amount of the capital stock of said association is three million dollars, divided into one hundred and twenty thousand shares of twenty-five dollars each. Said capital stock is and shall be represented by the several lines of telegraph and other property, grants, and purchases of the Great Western Telegraph Company, it being expressly understood and provided that the capital stock of this company and the number of its shares and the par value
28 of its shares and of its stockholders may be hereafter increased or diminished from time to time by its board of directors or trustees to such an amount and number as they may deem for its best interest by a vote or written consent to such increase of two-thirds of the whole number of the directors or trustees present at a meeting called by the executive committee for that purpose; and it is further understood, agreed, and provided that the shares in said company may be transferred in accordance with the by-laws of said company.

Fourth. The name and place of residence of the shareholders and the number of shares held by each respectively at this time are:

Valentine F. Gardner, New York, one share.

John Hall, city of Brooklyn, New York, one share.

Dwight Johnson, city of Brooklyn, New York, one share.

Josiah Snow, of Chicago, one thousand shares.

David A. Gage, Chicago, Illinois, one thousand shares.

Hasbrouck Reeve, New York city, New York, one hundred shares.

Selah Reeve, of Chicago, Illinois, one hundred and seventeen thousand eight hundred and ninety-seven shares.

Fifth. That the association shall commence on the first Wednesday of December, A. D. 1867, and shall terminate on the first Wednesday of December, A. D. 1967, unless sooner terminated by an unanimous vote of its board of directors or trustees at a regular meeting

called for that purpose or by a decree of some court of competent jurisdiction; and it is further hereby expressly understood, agreed, and provided that the property, grants, and franchises of the telegraph company hereby constituted shall be held, managed, and controlled by a board of such a number of trustees or directors as may be fixed by a majority of the shareholders of this company whenever said directors have become shareholders of this company or when they shall have subscribed for the stock of said company each to the number of fifty shares, and said board of directors shall have power and they are hereby authorized to hold the property, grants, and franchises of said company now existing or such as it may hereafter in any way acquire and to control, manage, and direct the business thereof in accordance with the articles and certificate herein contained and such rules, regulations, and by-laws as may hereafter be made by such board of directors, it being hereby expressly
29 agreed and provided that the acts of said board of trustees or directors relative to the management, direction, and disposal of the property, grants and purchases and business of said company done in good faith shall have all the force and effect and shall be deemed the acts of the shareholders and of the company as fully as if all were present and acting, and the persons elected at the meeting of the shareholders hereinbefore mentioned shall be, and they are hereby, elected and constituted the first board of directors of said company and shall hold their office for one year from the first Wednesday in December, 1867, or until others shall be elected in their place and stead as shall be provided for in the by-laws of said company.

And the said board of directors or trustees shall elect by ballot from their own body a president, vice-president, and an executive committee of three, upon whom they may devolve the exercise of such of their powers and duties in the management and direction of the business of said company as they may deem for its best interest and as shall be provided for in the by-laws of said company or by resolution of said board, and said board shall appoint a secretary and treasurer of said company and shall fix and determine the compensation or salary to be paid said secretary and treasurer, and said officers shall hold their offices during the pleasure of the board of directors, and said executive committee shall hold their offices for one year, and thereafter until others shall be elected in their places and stead, and said board of directors or trustees shall have power, and they are hereby authorized in the by-laws or by resolution, to increase or decrease from time to time the number of persons who shall all constitute said board, and in case of increase at any time to elect by ballot any stockholder of said company or any subscriber to fill the vacancy thus created until the next succeeding election by the shareholders of said company.

And the said board of directors are hereby authorized and empowered and it shall be their duty to make all needful and providential rules, regulations, and by-laws for the proper management and transaction of the affairs and business of said company, and therein especially to provide for the proper transfer of the shares of

said company, for the future election of the board of directors or trustees, and for the appointment of all officers, agents, servants, and employés of said company, except such as are hereinbefore provided for, and therein and thereby confer upon said officers and said executive committee hereinbefore mentioned the right and authority to prescribe the duties and functions of said agents, servants, and employés, and to fix their period of service, compensation, or wages, and in all other respects to provide for a thorough systsm of working the lines and carrying on the business of said company, which said rules, regulations, and by-laws shall have the same force and effect and be as binding on the company hereby constituted as if set forth in the certificate and articles of agreement and association.

In witness whereof we have hereto set our hands and seals the 2nd day of December, A. D. 1867.

[CORPORATE SEAL.]

JOSIAH SNOW. [SEAL.]
SELAH REEVE. [SEAL.]
D. A. GAGE. [SEAL.]

STATE OF ILLINOIS, }
Cook County, City of Chicago, } *ss:*

I, Chas. B. Hosmer, a notary public in and for said city, do hereby certify that Josiah Snow, Selah Reeve, and David A. Gage, personally known to me as the same persons whose names appear to the foregoing instrument of writing, appeared before me this day in person and severally acknowledged that they signed, sealed, and delivered the same as their free act and deed for the uses and purposes therein expressed.

In testimony whereof I have hereunto set my hand and seal notarial this 12th day of May, A. D. 1868.

C. B. HOSMER,
Notary Public.

Certificate of secretary of State of Illinois.

S. L. GLASGOW: As attorney for defendant, I went to clerk's office of the circuit court of Cook county, Illinois, January 2, 1890.

(Counsel for plaintiff objected to Gen. Glasgow making any statement about what was done in the clerk's office by the clerk or his deputies. Objection overruled and exception by plaintiff.)

I was there two or three weeks before that for the purpose of obtaining copies of the original bill and amendments, answer, replication, etc., in the case of Terwilliger *et al. vs.* The Great Western Telegraph Company *et al.*, No. 4884, heretofore pending in that court. I found an entry on the clerk's docket of the date of the filing.

(Plaintiff moved to strike out the statement of what he found on the clerk's docket. Motion overruled and exception by plaintiff.)

All these papers were, as I supposed, in charge of the clerk, Mr. Kline, at work there; was told by some one to go with me and make

a search for those papers. We searched two days and went through five large boxes of papers, labelled as papers in this Terwilliger case. We could not find these papers in that office or in those boxes. I also called upon a Mr. Wilson—not sure about his name—clerk in Judge Tuley's room.

(Plaintiff moved to strike out the evidence of General Glasgow on the ground that it was incompetent, irrelevant, and immaterial. Motion overruled and plaintiff excepted.)

Cross-examination by Mr. SUTHERLAND:

Searched four days; looked at the clerk's docket in which he entered the filing of papers; saw none of the attorneys and did not ask them if they had the papers; am not certain whether I asked you about the pleadings; think I asked you about the supplemental bill; not sure about it. I did not know you were the attorney in the Terwilliger case. I thought you were the attorney for the receivers. I did not inquire who the attorneys were for the different parties. I did not inquire of the different attorneys in the case as to where the papers were. I did not find that those pleadings had been restored since the fire. I saw an order of restitution. The clerk said it had never been complied with. I searched for the original papers, filed originally in the case. There seemed to be an application that the pleadings be restored.

Redirect:

On the visit January, 1890, I searched through all the papers for the original of this supplemental bill filed by Jones *et al.* in November, 1874, and I couldn't find it. I asked Tenny, Bashford & Tenny for it and Mr. Bennett for it, and they said they did not have it.

32 (Plaintiff moves to strike out this testimony as incompetent, irrelevent, and immaterial, but the court denied the motion and plaintiff excepted.)

Defendant offered in evidence a certified copy of the original bill of complaint, exhibits and amendments thereto, and answers in Terwilliger *et al. vs.* the plaintiff *et al.*, certified as being copies of transcript in his office by A. H. Taylor, clerk of the supreme court of Illinois, at Ottawa. (The substance of these are set forth in the case of Terwilliger *et al. vs.* The G. W. T. Co. *et al.*, referred to in 59 Ill.)

(Plaintiff objected to there introduction on the ground of incompetency, irrelevancy, and immateriality, and also as they don't appear to be copies of any original papers in the office of the clerk of the circuit court of Cook county, Illinois; don't pretend to be a copy of the original pleadings filed in the case, but the court overruled the objection and allowed the papers in evidence, and plaintiff objected.)

Also offered to read the deposition of Ingolf K. Boyeson, filed January 16, 1890.

(Plaintiff objected to the reading of the deposition on the ground

that the whole of it was incompetent, immaterial, and irrelevant, but the court overruled the objection and allowed it to be read, and the plaintiff excepted.)

Deposition of I. K. Boyesen.

I am master in chancery of the circuit court of Cook county. I have in my possession as such master a certain written contract of the date of March 25, 1868, purporting to have been made and executed by and between the Great Western Telegraph Company, through David A. Gage, its then president, and Josiah Snow, secretary and treasurer. I also have in my possession as such master a certain writing of March 25, 1868. I also have in my possession a certain supplementary agreement of date March 26, 1868, purporting to have been made and executed between Selah Reeve, the Great Western Telegraph Company, and Josiah Snow as
33 trustee. All of said contracts are in my custody as such master and came into my possession by being introduced in evidence by the parties complainant before me on a hearing in a suit in which Charles B. Farwell and others are complainants and The Great Western Telegraph Company and others are defendants. I cannot attach the originals of said contracts or either of them to my deposition herein, because I cannot do so according to law. I do attach copies compared by me with the documents in my possession. I here hand the commissioners a true copy of said contracts and make the same and each of them a part of my answer, and they are marked Exhibits "A," "B," and "C" and are as follows:

EXHIBIT "A."

Memorandum of agreement made this 25th day of March, A. D. 1868, by and between Selah Reeve, a telegraph contractor, and the Great Western Telegraph Company, a body corporate under State laws, and organized under an act of Congress of the United States, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866:

In consideration of one (1) dollar in hand paid to the said contractor by the said company, and the covenants and agreements hereinafter contained to be kept and performed by said company, the said Selah Reeve is hereby employed by and doth hereby covenant and agree to and with the said Great Western Telegraph Company to construct, equip and complete for the said company, two thousand (2,000) miles of telegraph line on such routes as the directors of said company may hereafter determine in accordance with the specifications herein contained.

The said lines are to start from the city of Chicago, and are to be continuous lines to such points as the directors may designate. The poles used in the construction of said lines shall be of cedar, chestnut, white oak, tamarack, or other durable timer, twenty-five (25) feet in length, and to measure at least four (4) inches diameter at

the top and eight (8) or more inches diameter at the butt; to
34 be firmly set in the ground four (4) feet, except in rock bottom, where they shall be set not less than three (3) feet. In crowded thoroughfares and at crossings and along the line of railroad depots, the length of the poles shall be from thirty (30) to forty (40) feet, as may be required, and the depth of the setting shall be proportionately increased. The insulators shall be of glass of an approved pattern and firmly secured to a pin set three and one-half ($3\frac{1}{2}$) inches in the top of the pole or on brackets made of oak or ash of dry wood.

The bracket or pin to be of the same size, length and pattern, and fastened to the pole in the same way as has been adopted by the Atlantic and Pacific Telegraph Company on their lines.

The insulators shall be placed high enough on the poles to permit the convenient addition of other wires and insulators, and also extra cross-arms, whenever the business of the company may require them.

The wire shall be number nine (9) galvanized or annealed, of English or American manufacture, and shall be secured to the insulator by a tie wire of the same number and quality as the line wire. The wire shall be attached securely in the usual way each side of the insulator and around it, to the wire of the line; the wire shall be drawn taut to an even tension and shall be run in the offices of the company, and properly connected with the instruments in the best and most approved manner on such portions of the routes through cities and in densely populated country where the business requires a number of wires, they shall be placed on the poles, and in the sparsely populated parts of the country where one (1) wire is sufficient to do all the required business, only one (1) wire shall be placed on the poles. The line shall be so constructed as to do the business of the company to the best advantage, and shall consist of at least three thousand five hundred (3,500) miles of wire.

All trees or branches of trees (except ornamental and shade trees), and other obstructions that may interfere with the insulation, or permanancy of working of the lines, shall be removed.

The instruments and batteries necessary for efficiently working the lines shall be of the best and most improved kinds, and shall be placed in the offices of the company at all points ordered by the executive officers of the company.

35 Submarine cables necessary to cross rivers, inlets, canals, or other water-courses shall be furnished and paid for by the said contractor; all necessary expenses for office equipments and furniture, instruments, construction, materials, and making every needful connection, that the said lines be in all respects fully complete and ready for business, shall be paid for by the said contractor.

In consideration of the aforesaid covenants and agreements to be faithfully kept and performed by the said contractor the said Great Western Telegraph Company doth hereby covenant and agree to and with the said Selah Reeve to issue and deliver to him certificates for shares in the capital stock of the said Great Western Telegraph Company, to wit: One hundred and twenty (120) thousand

shares on the execution of this agreement; the said shares to be owned and represented by said Selah Reeve in all meetings of the shareholders of said company, until such time as the same shall be subscribed and fully paid for by other parties.

In witness whereof the said Great Western Telegraph Company, by the hand of its president and the corporate seal of the company, and the said Selah Reeve, contractor, by his hand and seal, have signed this agreement the day and year first above written.

D. A. GAGE, [SEAL.]
President Great Western Tel. Co.
SELAH REEVE, [SEAL.]
Contractor.

Witness:
P. C. DODGE.

EXHIBIT "B."

Executive Committee.

Trust deed for the purpose of facilitating the contract between Selah Reeve and the Great Western Telegraph Company, and for the transfer of certain stock therein named as security to said company, for the full and faithful performance by Selah Reeve of said contract.

Memorandum made this 25th day of March, 1868, between Selah Reeve, contractor, and Josiah Snow, in the city of Chicago, in the State of Illinois.

Whereas, the said Selah Reeve, party of the first part, has
36 entered into an agreement with the Great Western Telegraph Company, a corporation created under and by virtue of State laws, and an act of the Congress of the United States, entitled, "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, to construct certain lines of telegraph specified in said agreement, which agreement bears even date herewith, and a copy of which is hereunto annexed.

And whereas, in consideration therefor, the Great Western Telegraph Company have covenated to issue and deliver to said Reeve, certain certificates of shares of capital stock of said company.

And whereas, certain of the shares of the stock of said company, so agreed to be delivered by said company, have already been subscribed for by existing shareholders of said company to the number of two thousand one hundred and three (2103) shares.

Now, therefore, for the purpose of facilitating the construction of said line of telegraphic communication and as a security for the performance of said contract, and at the same time in order to provide the necessary means for carrying on said work as it progresses, and in consideration of the sum of one (1) dollar in hand paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the said Selah Reeve doth hereby sell and assign to said Josiah Snow, party of the second

part (to take and receive the same from said company) one hundred and seventeen thousand eight hundred and ninety-seven (117,897) shares of said stock, so as agreed to be delivered as aforesaid.

To have and to hold the same to the said party of the second part upon trust, to sell and dispose of the same to such persons as the said party of the second part by himself, or through the Great Western Telegraph Company or any of his or their agents, shall procure as subscribers to said stock, at a rate of not less than ten ($10) dollars per share, and to pay over and apply the proceeds of said stock as the same may be required for the prosecution of the work at the times and in the manner, and for the purposes prescribed in the before-mentioned contract, and all supplements thereto, if any are made.

37 The said party of the first part hereby authorizes and empowers the said party of the second part to accept and receive said stock from said company, under said agreement, as the attorney for the said party of the first part hereby for that purpose duly constituted and appointed to sell and dispose of the same by himself, or through any agent or agents in such manner and at such times as he shall in his discretion think best to provide the necessary means for the prosecution and completion of said contract, and to apply the proceeds thereof as fast as they may be needed for the performance of said contract in accordance with the terms thereof.

The surplus of such sales (if any) after payment of the expenses of organizing said company and constructing said lines, to be paid over and accounted for to said party of the first part.

And it is agreed by the parties to the trust that the account and moneys of the trust shall be kept at one of the lawful banks of the city of Chicago, or with the treasurer of the Great Western Telegraph Company, who shall keep the same in a lawful bank of the city of Chicago, and that should any difference of opinion arise on any point included in this instrument, such difference of opinion shall be referred to and settled by arbitration in the usual way.

And the said party of the second part hereby accepts the said trust, and covenants, promises and agrees to undertake and perform the same.

JOSIAH SNOW.

Stamped, signed, sealed and delivered in the presence of P. C. Dodge.

SELAH REEVE. [SEAL.]
JOSIAH SNOW. [SEAL.]

EXHIBIT "C."

Memorandum of a supplementary agreement made and entered into on this 26th day of March, 1868, by and between Selah Reeve, contractor, of the first part, and the Great Western Telegraph Company, of the second part, and Josiah Snow, as trustee, of the third part, witnesseth:

Whereas, the parties of the first and second parts hereto, entered into a certain contract for the construction of certain lines of tele-

graph, which contract bears date 25th day of March, 1868, a copy of which is hereto annexed, and whereas the said party of the
38 first part, by a certain conveyance to the said Josiah Snow, as trustee, bearing even date with the said contract, did assign to the said trustee certain shares of his stock, upon trust, therein particularly set forth, as will more fully appear upon reference to said conveyance, a copy of which is hereunto annexed; and whereas, certain persons have subscribed to the stock of said company to the amount of two thousand one hundred and three (2103) shares; and whereas, the parties hereunto have mutually agreed to modify the said contract and trust deed, and alter and improve the relative positions of the parties hereto, and of the present and future subscribers or holders of the said stock, in the respect hereinafter set forth.

Now, therefore, in consideration of the premises, and of the benefits and advantages to result from said modification, it is agreed that the said contract and deed of trust shall be corrected and modified as follows:

First. The said Selah Reeve agrees that said deed of trust, in the authority it conveys to the trustee to sell stock, through agents, agencies, or the Great Western Telegraph Company, shall be construed as giving, and does give, authority irrevocable on his part, to the trustee, to employ the Great Western Telegraph Company, or such other agents as the trustee may appoint, to sell and dispose of said stock by subscription, and additional power is hereby given said trustee to make, sign and execute an agreement, irrevocable, with the said Great Western Telegraph Company, to furnish and transfer to them such number of shares of the stock deeded and transferred to said trustee, as they may procure to be subscribed for, at the rate which said trustee is authorized to sell the same, provided the said Great Western Telegraph Company shall pay into the hands of the trustee the said — (10) dollars per share, less the commission hereinafter provided for, on the stock so procured, to be subscribed for by them; and further, the said Selah Reeve hereby agrees that the said trustee shall have, and by this instrument does have, the right to pay the sum of fifty (50) cents per share commission for the sale or procurement of subscription for said stock, at the price aforesaid; and further, the said Selah Reeve hereby agrees to procure, by purchase or otherwise, before the completion of this contract, and transfer the same to the trustee, the said two thousand one hundred and three (2103) shares previously subscribed
39 for, hereby agreeing, in case he shall fail to do so, to forfeit, on final settlement, to said company, the value of said shares, and credit said forfeiture as a payment on said contract.

Second. The said Great Western Telegraph Company agrees through its proper officers, to aid and assist, to the best of its ability, the said trustee in the sale and disposal by subscription of the stock of said company, but does not guarantee to said Reeve the disposal of any part thereof.

Third. The said Great Western Telegraph Company agree to supply a competent inspector, or inspectors, whose duty it shall be to

inspect the work performed by the said Selah Reeve, in sections of ten (10) miles each, or from office to office, at the option of said Reeve, and if the work conforms to the specifications contained in the contract with the Great Western Telegraph Company, said inspector shall issue to said Reeve a certificate of inspection in the name of the company for the said work, and the said Josiah Snow, trustee of said Reeve, and said company on presentation of said certificate of acceptance, accompanied by a bill duly receipted by said contractor, or his legal representative, shall pay for said work from the trust moneys in his hands, or under his control, at the rate of three hundred ($300) dollars per mile, for single-wire line. Four hundred ($400) dollars per mile for double-wire line. Five hundred ($500) dollars per mile for three (3) wire line. Six hundred ($600) dollars per mile for four (4) wire line. And the said trustee is hereby authorized and directed by said company to pay the same at the rate above mentioned, from moneys in his hands or to his credit with the treasurer of the company, or in some lawful bank, as aforesaid, resulting from sales of, or subscriptions for said stock, and the inspector's certificate of acceptance accompanied by the bill duly receipted, as aforesaid, shall be his receipt for said payment, and so recognized by the company.

Fourth. The said Great Western Telegraph Company agree that the said Reeve may prosecute the work under said contract, either by the erection of continuous and completed lines to be inspected in sections of ten (10) miles each, as aforesaid, on the routes designated by the executive committee of the Great Western Telegraph Company, or that he may, if he shall so select, distribute along the routes so designated, the necessary poles under the contract, and set the same ready fitted with insulators and pins or brackets in accordance with the contract, before stringing the wire upon any portion of said route.

Fifth. The said Great Western Telegraph Company agree that in case said Reeve elects on any particular route or routes, to build as provided in section fourth of the agreement, that they will promptly cause their inspectors to inspect the poles, brackets, pins and insulators designated for said routes, so to be built where offered for inspection in quantities of one thousand (1,000) or more in number, and that if the same are found to be in accordance with the requirements of the contract, said inspector shall issue a certificate to said Reeve accepting the same, under the contract of said Reeve, and payment shall be made by said trustee to said Reeve in the manner hereinbefore provided for completed line, except that the said Reeve shall be entitled on the distribution of said inspected and accepted poles, at their proper places and distances in sections of thirty-five (35) miles each, only to the *pro rata* payment of what he would receive on completed line, and except further on the setting up of said poles in like sections, fitted and prepared for the wire in the manner required by the contract, and so certified by the inspector, the said Reeve shall only be entitled to an additional *pro rata* payment of what he would receive on completed line.

Sixth. The said Great Western Telegraph Company further agree

that when the wire is placed upon said poles so erected as in section fifth of this agreement, and the offices along said sections are furnished and equipped in accordance with the contract, and so certified by the inspector that then and in that case, the said Reeve shall be paid in the manner heretofore provided for completed line by the trustee, the remaining amount due him, the same having become completed line.

Seventh. The said Great Western Telegraph Company and said Reeve agree that the excess of money received from the sale of, or from subscription for, said stock at the rate of fifty (50) shares per mile, over and above the payments hereinbefore specified, shall be retained by the trustee as security for the prosecution of the work until the number of five hundred (500) miles averaging as double-wire line shall have been completed and put in working order, at which time a settlement shall be made, and the amount then due on the said five hundred (500) miles shall be paid, after de-
41 ducting the amount expended by the company and trustee for current and incidental expenses, and for commission paid to agents for the sale or procurement of subscription for the aforesaid stock.

Eighth. The said Selah Reeve and the Great Western Telegraph Company further agree that the said work shall be promptly inspected as to completed lines, in sections of ten (10) miles each, or from office to office, at the option of said Reeve as fast as completed, and as to material in lots of one thousand (1,000) or more, and as to partially built line in sections of thirty-five (35) miles, as hereinbefore set forth ; and it is also agreed that if the said company shall neglect or omit to have such inspection made after notice of readiness, then twenty-five days thereafter the said Reeve may demand and shall have payment as if inspection had been made upon the section or lot so offered for inspection, and a certificate issued therefor.

Ninth. It is further agreed and provided that should said inspector reject the work or lot as not conforming with the contract, he shall notify the said Selah Reeve in writing, giving in detail his objections, and on receipt of notice from the said Reeve that the objections have been obviated another inspection shall be promptly made, and if found in accordance with the contract, the certificate of acceptance shall be issued to said Reeve.

Tenth. It is further agreed that if the company order extra brackets, cross-arms and insulators placed on the poles ready for extra wire or wires when needed, the said Selah Reeve is to be paid at the rate of twenty-five (25) dollars per mile for each extra set of brackets or cross-arms and insulators, and the inspector shall make special mention of such addition in certificate of inspection.

Eleventh. It is further agreed that the line shall be measured by the inspector along the routes of the wire, including every mile and fraction of a mile run, and that nothing in this agreement shall give the said company any title to any portion of the line not paid for by the trustee, but that each section or lot as fast as paid for by the

trustee shall be considered to have been delivered and shall be the property of the company.

Twelfth. It is understood and agreed that the provisions relative to a settlement for the first five hundred (500) miles, as aforesaid, shall be applied to all the work done by said Reeve, and that all the provisions of this contract dated the 25th day of March, as aforesaid, remain in full force and effect, except so far as they are altered and modified by this supplement, and that the title and right to represent the stock sold and assigned in trust by said Reeve shall remain in the trustee until such time as the same shall be fully paid for by parties purchasing or subscribing for the same.

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Thirteenth. It is further agreed and understood that in case the said trustee shall not have moneys at his command derived from the sale of, or from the subscription for, the stocks conveyed to him in trust as aforesaid, that then and in that case the said trustee may transfer to said Reeve, if he so elects, as payment under the contract, stock at the rate of fifty (50) shares per mile, provided the said Reeve, for every fifty (50) shares so transferred to him in payment shall deposit with the treasurer of said company the sum of ten dollars ($10) until a general settlement is made, as hereinbefore provided for, at the completion of each five hundred (500) miles.

Fourteenth. It is further agreed and provided, that for every mile of extra wire, with brackets, insulators and other necessary equipments thereto, in excess of the number placed on the poles, as herein provided for, said company agree to pay to said Reeve at the rate of one hundred dollars ($100) per mile.

Fifteenth. It is further agreed, that should any difference of opinion arise between the company and said contractor, concerning the meaning, construction or application of this agreement, such difference shall be submitted to the decision of three disinterested persons, one to be selected by each party, and the two so chosen to select a third, and the decision of the majority of the three so chosen shall be final.

Sixteenth. It is further agreed by and between all parties hereto, that should a vacancy occur in the trusteeship, created by said deed of trust hereinbefore mentioned, either by death or resignation of said Josiah Snow, that then and in that case the trust thus created does not lapse, but that the trust is continuous and irrevocable until all the business arising from the same is duly closed, and in the case above mentioned a new trustee shall be chosen by the said Selah Reeve and the president of the Great Western Telegraph Company and the said Josiah Snow or his legal representatives, and that in case of disagreement between the above-named persons, the trustee selected by a majority of them shall be accepted as the trustee by all.

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In witness whereof the said Selah Reeve, contractor, and the said Josiah Snow, trustee, by their hands and seals, and the Great Western Telegraph Company, by the hand of its president and its cor-

porate seal, have signed and attested this agreement on the day and year first above written.

SELAH REEVE, [SEAL.]
D. A. GAGE, [SEAL.]
President T. G. W. Tel. Co.
JOSIAH SNOW, *Trustee.* [SEAL.]

(Plaintiff objected to the reading of the whole deposition, and moved to strike it out as incompetent, irrelevant, and immaterial, and further because the witness shows by his own testimony that he has no knowledge of the signatures of the parties, but the same was overruled and denied, and the plaintiff excepted.)

Defendant also offered in evidence the opinion of the supreme court contained in 59 Ill., pages 249 to 260 (this has been referred to and offered in evidence by plaintiff). Defendant also offered in evidence the said decree of November 16th, 1872 (this is set forth heretofore in plaintiff's evidence).

Also the satisfaction of the order for payment of costs mentioned in said decree and written on the margin thereof, dated January 7, 1873:

"The judgment mentioned in this decree against defendants satisfied by return of execution No. 774, January 7th, 1873.
"JACOB GROSS, *Clerk.*"

Also offers a copy of petition of plaintiff A. C. Kellogg and W. B. Harford made and filed in said Terwilliger case March 5th, 1873.

(Plaintiff objected to the same as incompetent, irrelevant, and immaterial. Objection overruled, and exception by plaintiff.)

The same introduced and in substance as follows:

That one of the petitioners is The Great Western Telegraph
44 Company, one of the defendants in said cause; that said Kellogg and Harford are two of the complainants therein; that on the 30th day of January, 1873, a new board of directors was elected (naming them); that the new board could not effect an amicable settlement with Selah Reeve, and asks an enforcement of the decree of Nov. 16, 1872; that an order be made at the foot of said decree referring said cause to a master in chancery of said court to take and state an account as between the said Reeve and said company, and that Reeve, Gage, and Snow be ordered to produce all books, etc., relating to the objects of the reference.

And offers copy of order of reference made in said Terwilliger case in pursuance of the foregoing petition, which is in substance as follows:

It appearing that all parties to this suit have been notified as to said petition and the hearing thereof, and the same coming on to be heard, it is ordered that this cause be referred to Chancey T. Adams, master in chancery of this court, to take and state the account as between the said Reeve and said company and report to the court, etc. (Endorsed on back of order:) "Jeremiah Ter-

williger *et al. vs.* Selah Reeve *et al.* Order of reference. Enter, W. W. F., March 8, '73."

Also offer a certified copy of a certain paper exhibit filed in the case of Charles Counselman *et al. vs.* William H. Anderson *et al.*, then pending in the circuit court of the U. S. for the southern district of Iowa, said exhibit purporting to be a copy of the supplemental bill of J. M. W. Jones *et al. vs.* the said Great Western Telegraph Company *et al.*, filed in said Terwilliger case on Sept. 19, 1874; also a certified copy of an agreed statement of facts attached to said exhibit and filed in the same cause, and which statement of facts was signed by the solicitors in said cause and bears date October 20th, 1885, and which recites that "on the 19th day of September, 1874, a supplemental bill was filed in said cause
45 (meaning said Terwilliger suit), a copy of which is appended as 'Exhibit No. 3' (meaning the said exhibit), the original of said agreed statement of facts having been filed in the office of the clerk of the said United States circuit court."

(Plaintiff objected to the introduction of the said alleged copy of bill and agreed statement of facts for incompetency and to the agreed statement of facts on the ground that it does not appear that the receiver of the plaintiff or the plaintiff company at that time were parties to that case, and that the attorneys who signed that statement of facts did not sign it as attorney for the receiver or for any person connected with this case; also object to introduction of alleged copy of bill, as it does not appear to be a copy of any such document or of any original document of that kind—they are each incompetent, irrelevant, and immaterial; further objects, as the whole appears to be only an agreement between counsel in another case and who did not represent any of the parties to this case; but the court overruled the objections of counsel for plaintiff and allowed the documents in evidence, and the plaintiff excepted.)

The alleged copy of supplemental bill in substance is as follows:

STATE OF ILLINOIS, } *ss.*:
Cook County, }

In the Circuit Court, September Term, A. D. 1874.

JEREMIAH TERWILLIGER *et al.* } In Chancery.
vs. } Supplemental Bill.
THE GREAT WESTERN TELEGRAPH COMPANY *et al.* }

Complainants J. M. W. Jones and others make themselves parties to the above-entitled case on consent, and file this supplemental bill for themselves and others like situated, and show that they are stockholders of the Great Western Telegraph Company; that they
46 refer to the original bill in said cause, and make the same a part of this bill; refers to the decree made in said cause November 16, 1872, and make that a part hereof; that on January 28, 1873, the said stockholders elected a new board of directors of said company; that said stockholders passed resolutions which duly went into effect; that said resolutions have been disobeyed by the

present officers of the company; that the officers of the company prevent the directors from having any voice in the management of the company's affairs; that they are refusing to pay the debts of the company and are fraudulently selling the bonds of the company and appropriating the proceeds to their own use; that they are conspiring to defraud the stockholders out of their property; have given a trust deed on the property, with strict clauses, with intention of swindling the corporation out of its property; that the accounts of the office of the company show great irregularities on the part of the officers; that they have been applying the money collected to payment of fictitious claims; that Stark, the president of the company, has pretended to act in double capacity of president and attorney, and to claim and receive pay therefor; that he has in this manner appropriated several thousand dollars of the company's money to his own use, and for which he is accountable; that the services of said Stark for said company are utterly valueless; that he has no executive ability, is without tact, and, your orators fear, without integrity; that while said Stark is taking large sums of money for his own pretended services he is at the same time sharing the fees of other attorneys who are in the employ of the company; that the lines of the company are badly out of repair; that many of the offices have been seized for debt and are closed; that the company is largely indebted to its operators, and the debt is constantly increasing; that Abel H. Bliss, one of the officers of the company, has much of the time since February, 1874, claimed to control the finances of the company, and, as orators
47 believe, appropriated large sums on spurious demands, and pays the debts and alleged debts without check or hindrance; has made over payments to himself and left the *bona fide* creditors of the company unpaid; that by collusion with the said Stark and Bond, the secretary, he is allowed a salary largely in excess of the value of his services; that a few years ago he was poor, but now claims to be well off; that he has had no visible income except the business of the company; that the present officers are running the company in debt at the rate of $20,000 per annum over receipts; that, owing to the crippled condition of the company, its corps of operators has become demoralized; that in most cases they do not pretend to settle with the company and are running the company into debt and incurring liabilities for the stockholders to pay; that the said Bliss is incompetent; that Stark and Bliss and their confederates contemplate the voluntary bankruptcy of the company, and have conspired to that end and to control the bankruptcy proceedings, and to procure therein the allowance of spurious claims against said company, and thus to absorb the property of the company and then enforce payment of any balance out of the stockholders; that they intend to have the property sold and buy the same in at a nominal sum; that said Bond has appropriated large sums of the company's money to payment of fictitious claims; that said corporation is utterly insolvent, and that *bona fide* debts to a large amount exist against it; that other debts, whose *bona fides* is being contested with the chances in favor of their

being established, exist against the company; that it is necessary that a receiver be appointed, its debts ascertained, and the property of the company appropriated to that end; makes Stark, Bliss, Allen, and Bond additional defendants, impleaded, etc., and prays summons, prays an accounting by them and the appointment of a receiver and a sale of the property and for general relief.

48 Plaintiff also offered the deposition of John I. Bennett, filed May 11th, 1890, as follows:

I was an attorney-at-law in 1874. In 1874 I prepared a supplemental bill, wherein J. M. W. Jones, myself, and others were of parties complainant. I filed the same in the clerk's office of the circuit court of Cook county, Illinois. The receiver was appointed Oct. 7, 1874, and I must have filed this intervening supplemental bill at least twenty days before that, at least not to exceed sixty days. The supplemental bill was filed in the case of Jeremiah Terwilliger, Nelson Wheeler, and others against The Great Western Telegraph Company, David A. Gage, Josiah Snow, and Selah Reeve, the defendants.

Also offers a duly certified copy of an agreement for the appointment of a receiver under the supplemental bill, filed in the Terwilliger case, October 7th, 1874, as follows:

STATE OF ILLINOIS, } *ss:*
Cook County, }

Cook Circuit Court.

JEREMIAH TERWILLIGER *et al.*
vs.
THE GREAT WESTERN TELEGRAPH COMPANY *et al.* } In Chancery.

It is mutually agreed by the parties to the supplemental bill in the above-entitled cause that a receiver shall be appointed in the above cause by the court; that the cause shall be referred to a master to take and report to the court the evidence bearing upon all claims against said company, except as to such as are already proven or stand referred for proof; that the master give public notice, etc.; that the court shall adjudicate the debts and order a sale of the property.

Chicago, October 5, 1874.

(Signed) JOHN CLARK HILTON,
By E. A. SMALL, *His Attorney.*
THOMAS J. SUTHERLAND,
Solicitor for Selah Reeve.
SLEEPER & WHITON,
Solicitors for Commercial National Bank.
BENNETT, KRETZINGER & VEEDER,
Solicitor- for said Complainant.
HARDING, McCAY & PRATT,
Solicitors for G. W. Tel. Co.

49 Also a copy of order appointing a receiver in the Terwilliger case, made October 7th, 1874, in substance as follows:

STATE OF ILLINOIS, } ss:
Cook County, }

Cook Circuit Court.

JEREMIAH TERWILLIGER *et al.*
vs.
THE GREAT WESTERN TELEGRAPH COMPANY *et al.* } In Chancery.

This day come the parties to the above-entitled suit, and the cause coming on to be heard upon the motion of said complainant in said supplemental bill for the appointment of a receiver herein of and for said corporation, and it appearing to the court that due notice had been given of the pendency of said motion to all persons who are parties to said suit, and that they are here present, either by counsel or in person, and that all of said parties have agreed and assented to the following order: It is therefore ordered by the court that O. H. Horton, Esq., be, and hereby is, appointed receiver of the Great Western Telegraph Company and all of its property and effects of every nature whatsoever. Ordered that the receiver shall give bond for the faithful discharge of his duties; that he shall take possession of the property and manage the same. This cause is referred to a master for proof of claims.

Also offers certificate of Henry Best as to date of filing the original bill in case of Almon Kidder *vs.* The Great Western Telegraph Company, No. 13551, chancery.

(Plaintiff objected to same as immaterial, incompetent, and irrelevant. Objection overruled and plaintiff excepted.)

It is as follows:

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof, do hereby certify that the original bill of complaint in the cause of Almon Kidder against The Great Western Telegraph Company, No. 13551, chancery, was duly filed in this office on the 12th day of October, A. D. 1874, as
50 the same appears from the records in my office, to wit, in Clerk's General Docket No. 4.

In witness whereof I have set my hand and affixed the seal of said court, at the city of Chicago, in said county, this 3rd day of January, A. D. 1890.

[SEAL.] HENRY BEST, *Clerk.*

Certificate of chief justice that H. Best is clerk.

Also offer copy of decree appointing receiver in Kidder case, dated October 13th, 1874.

(Plaintiff objected on the ground of incompetence, irrelevancy, and immateriality. Objection overruled and plaintiff excepted.)

This decree is in substance as follows: The company consenting and on motion of complainant, Oliver H. Horton is appointed re-

ceiver in this case of the company and its property, etc., with the usual powers, etc.

Also offers a copy of a resolution passed by the executive committee of the company at a meeting held by said committee at the office of the company, in Chicago, June 15, 1872, as found on page 71 of the record book of said company.

(Plaintiff objected to its introduction on the ground of immateriality, incompetency, and irrelevancy. Objection overruled and exception by plaintiff.)

The resolution is as follows:

Resolved, That it is ordered that all balances unpaid by subscribers for shares of the capital stock of the Great Western Telegraph Company are hereby declared due and payable at the office of the company, in Chicago, on the 12th day of July next, and that the secretary notify the subscribers of this order and demand payment.

Also offer copy of certain proceedings and resolutions passed at a meeting of stockholders of the company held at Chicago, Illinois, January 28, 29, 30, 1873, as found on pages 7 to 9 of record book of company.

(Objected to by plaintiff as irrelevant, immaterial, and incompetent. Objection overruled and exception by plaintiff.)

51 In substance they are as follows: January 28, on motion, voted that the president and secretary issue stock to such as apply for it, the same to be issued in accordance with the decision of Judge Williams, and that the treasurer make report.

January 29.—Minutes of last meeting read and approved. Committee on by-laws presented report, and, after some amendment, report was adopted. Voted that the special business of the meeting in the afternoon shall be the election of directors. Adjourned to 2 p. m.

At 2 p. m. Joshua Stark presented a resolution as to voting for the adoption of the new by-laws and the election of directors. Voting took place by ballot.

January 30, 10 a. m.—The inspectors of election announced the following persons elected directors (naming them).

The by-laws reported were adopted unanimously.

Whole number of votes cast for directors, 19,241.

Adjourned *sine die*.

Also offers certified copy of original bill, amendments, answers, exhibits, and replication and final decree in the case of Charles Counselman *et al. vs.* W. H. Anderson, Hiram Purdy, *et al.*, in the circuit court of the United States for the southern district of Iowa, central division.

(Plaintiff objected to same as irrelevant, immaterial, and incompetent. Objection overruled and exception by plaintiff.)

Bill.

In the Circuit Court of Iowa in and for the County of Polk, Sept. Term, '82.

CHARLES COUNSELMAN, JOHN J. MCCLELLAN, and E. R. BOWEN, Receiver of the Great Western Telegraph Company,
vs.
W. H. ANDERSON, HIRAM PURDY, *et al.*

Plaintiffs are citizens of Illinois and defendants citizens of
52 Iowa; that the Great Western Telegraph Company is a corporation under laws of Illinois; that a receiver was appointed; that defendants are stockholders and liable; that said Counselman and McClellan are creditors of company, stating amount, and prays judgment for the amount of the claims. (Filed August 15, 1882.)

Petition for removal of said cause to United States court (filed Sept. 5, 1882) and bond for removal filed on same day.

Order transferring cause to United States court as follows:

Sept. 23, 1882. Journal 15, page 274.

CHARLES COUNSELMAN *et al.*
vs.
W. H. ANDERSON *et al.*
No. 2128. Equity.

Ordered that this cause be transferred to the circuit court of the United States at Des Moines; to which ruling the defendants except.

Demurrer filed Dec. 4, 1882.

Amendment to bill filed June 1, 1883.

Answer filed Dec. 31, 1884. Admit incorporation of company and appointment of receiver; that they signed the subscription contracts, but deny their validity, and that they are stockholders; deny the indebtedness alleged; deny that plaintiffs have any right to maintain their bill, and that they are only liable to proceedings instituted by order of the circuit court of Cook county, wherein the receiver was appointed; set up the statute of limitations of five years.

Replication filed March 5, 1885.

Amendment to answer filed May 19, 1885.

Deny that the claims are in judgment or unsatisfied; allege that the claims accrued after the appointment of the receiver; deny again that they are stockholders.

Decree.

United States Circuit Court, Southern District of Iowa, Central Division, October Term, 1885. Wednesday, Oct. 28, 1885.

53 CHARLES COUNSELMAN *et al.* vs. WILLIAM H. ANDERSON *et al.* } No. 1957. Equity.

Decree against several of the defendants, not including Hiram Purdy, and bill dismissed as to other defendants.

Also introduce an act of the legislature of Illinois approved April 18th, 1872, concerning corporations, and in force July 1st, 1872, as found on pages 269 to 307, inclusive, of Public Laws of Illinois, 1871 and 1872; also on pages 286 and 287, R. S. of Ill.

D. P. STUBS testified: Purdy and I were made parties complainant to the Terwilliger bill by a petition filed by us for that purpose and an order of court made in pursuance thereof, I think, in 1870. I attended the meeting of stockholders in January, 1873; I got Purdy's certificate then. This meeting of the stockholders was the one called in pursuance of the decree entered in the Terwilliger case.

HIRAM PURDY, sworn, testified: Am defendant. The person who requested me to subscribe for the stock of the company was Snow; he represented himself as an agent of the company; he said they would go right on and put up the poles. I made my subscription supposing he was the agent for the Great Western Telegraph Company and supposing they owned the stock and had it for sale. I did not know Selah Reeve at the time. I have paid $275.00 on that subscription. I think the last I paid was in the latter part of 1869. I know I made one payment more than some of the others did. I got a receipt for the money I paid him. I gave them to Mr. Stubs. I was a party with Stubs in the Terwilliger case. I became a party shortly after I paid, along in the spring of 1870. I had paid the $275.00 before this. I don't think I ever received any notice of the filing of the supplemental bill. I had no individual knowledge of its filing. I never authorized any one to appear for me only Mr. Van Buren and Mr. Stubs. Mr. Van Buren was solicitor for
54 me. I did not authorize any one to appear for me in any proceeding as to appointment of receiver or making an assessment. No notice served on me personally as to these things. I never authorized any one to appear for me. I was a party defendant in the Des Moines suit.

Cross-examination by Mr. SUTHERLAND:

Judge Van Buren was my attorney in the Terwilliger case in Illinois. I gave him and Stubs my papers and employed them to attend to the matter for me.

Ques. You don't know whether Stubs had notice of any proceedings in the Terwilliger case?

Ans. Understand, now, Mr. Stubs was not my counsel. Mr. Van Buren was my counsel. I don't know whether Van Buren had any notice or not.

Defendant rests.

Evidence in Rebuttal by Plaintiff.

Introduces a certified copy of an order entered in the case of Counselman *et al. vs.* Anderson *et al.*, Sept. 4, 1882, in the district court of the county of Polk, Iowa, as follows:

"SEPTEMBER 4, 1882.

CHARLES COUNSELMAN *et al.*
vs.
W. H. ANDERSON *et al.* } No. 2128. Eq.

"Now comes the plaintiff and dismisses this action so far as the same relates to E. R. Bowen, receiver.

"(Signed) JOSIAH GIVEN, *Judge.*"

Also introduces a certified copy of a part of the transcript of the record of said Counselman case in the Polk county circuit court, as filed in the United States circuit court, southern district of Iowa.

"Sept. 4, 1882. Journal 15, page 203.

"CHARLES COUNSELMAN *et al.*
vs.
W. H. ANDERSON *et al.* } No. 2128. Equity.

"Now comes the plaintiff and dismisses this action so far as the same relates to E. R. Bowen, receiver."

55 Clerk of the United States circuit court certifies it to be a complete copy of the order of dismissal as to E. R. Bowen, receiver, as the same is contained in the transcript of record from the circuit court of Iowa in and for Polk county in a certain cause removed therefrom to that court, wherein Charles Counselman *et al.* were complainants and W. H. Anderson *et al.* were defendants, as full, true, and complete as the transcript of same now remains on file and of record in that office.

THOMAS J. SUTHERLAND testified: No order was ever made allowing Mr. Bowen to appear as a party in any case at Des Moines, Iowa, in which Charles Counselman appeared as a party plaintiff. I will state, as a matter of fact, of my own knowledge, that Mr. Bowen's name as receiver was introduced into that Iowa case, where Counselman was a party, without his knowledge or consent and without any application having been made upon him for that purpose, and that afterwards the matter was dismissed as to him.

There was a certain original contract made between the company by David A. Gage, its president; Josiah Snow, and Selah Reeve,

dated October 26th, 1868, and signed by the parties in person. The original contract was in the possession of the company at the time of the appointment of the receiver. That original contract is lost. I offer a copy of that contract in evidence. This is a copy of the original to my own knowledge.

(Objected to, overruled, and exception.)

DEFENDANTS' EXHIBIT ON REBUTTAL.

Memorandum of an agreement made and entered into, this 26th day of October, A. D. 1886, by and between the Great Western Telegraph Company, Josiah Snow, trustee, and Selah Reeve, contractor.

Whereas, the Great Western Telegraph Company on the 25th day of March, 1868, entered into a contract with Selah Reeve for the construction, completion, and equipment of certain lines of telegraph therein mentioned.

56 And, whereas, by a deed of trust of the same date, certain stock of said company was conveyed in trust to Josiah Snow, to be sold and the proceeds to be used for the construction of said telegraph lines, and to secure the performance of said contract by both parties.

And, whereas, on the 26th day of March, A. D. 1868, the said company and the said Selah Reeve, and the said Josiah Snow, the trustee aforesaid, entered into an agreement by which the terms of said first agreement and said deed of trust were modified and changed.

And, whereas, certain differences have arisen between the parties as to the construction of said contracts; the said Selah Reeve claiming that the effect of said several agreements was to transfer to him absolutely all of the stock of the said company, and the said company claiming that said stock was held in trust for said company to secure to said Reeve the sum agreed to be paid for the organization, construction, completion and equipment of said telegraph lines.

And, whereas, it has become important to the success of the enterprise, that the wire manufactured by the American Compound Wire Company called the compound wire L, should be substituted for the wire contemplated in the original contract.

Now, therefore, for the purpose of removing said differences and all other differences between the parties, and the more clearly to define their respective rights and liabilities hereafter, the said parties agree as follows:

First. The third section of the supplemental agreement of March 26, 1868, is so far modified and changed as to dispense with the putting up of more than two (2) wires upon any line of poles, except such additional wires for loops and parts of lines as the company may have or may order, which is to be paid for at the price mentioned in said contract. All the other provisions of said section, including the prices to be paid for one wire line and double wire

line, are retained, except that the said Reeve agrees to put up, in the construction of said lines, the compound wire mentioned in the resolution of the executive committee, adopted Oct. 19, A. D. 1868.

Second. Out of the amount to be paid to the said Selah Reeve for the construction, completion and equipment of said lines of telegraph, as provided in said section, said Reeve shall be charged
57 with all commissions for obtaining stock subscriptions, as provided for in said supplemental agreement to the extent of the amount paid to said Selah Reeve for building, completing and furnishing said lines, and no more, which said commissions are to be deducted from the amounts to be paid said Reeve as and when they are paid.

Said Reeve is also to pay all such expenses as those of initiating and organizing the company, furniture needed in the operating telegraph offices, all submarine cables, lightning arresters, repeaters, sounders, recorders, batteries, ground connections, office wire, stationery, advertising, stamps and postage.

Said Reeve is also to furnish, put and keep in order until he shall deliver, or be ready to deliver, the said line, or any section thereof, to the company, and to pay all office expenses other than those of the operating offices.

Third. The said company shall pay all the expenses of the collection of the sums subscribed to the capital stock, and all legal expenses, attorneys' and counsel fees, and all other expenses of litigation, if any.

Fourth. The capital stock of the company shall be held by the trustee, and his successors, and shall be and remain a guarantee of the faithful performance of the contract, both by the company and the contractor, and at the end of four months after the completion of the construction and equipment of the lines contracted for, and the payment to the said Selah Reeve of all moneys that shall be due him under said contract, which payment shall be completed within said period of four months, after the last of the work is finished and delivered, or ready to be delivered, the said trustee shall reassign to the company all the capital stock of the company then remaining in his hands.

Provided that if the said Selah Reeve shall within the said period of four months show to the company or its directors, that the construction, completion and equipment of said lines, and the expenses assumed and paid by him shall have reduced his net profits below twenty per cent. of the agreed price per mile of line with single wire, and of the additional wire, then upon such showing, the deficiency of said twenty per cent. profits shall be paid to the said Selah Reeve, before said stock shall be reassigned to the company, and the same shall be held by the trustee in trust until such payment is made.

58 Fifth. Nothing in this agreement or anything in those to which it is supplementary shall be construed as preventing the company from appropriating out of the proceeds of the sale of the stock all such amounts as may be necessary for the payment of

any claims or liabilities against the company in its ordinary business.

In witness whereof our hands and seals and the seal of the Great Western Telegraph Company and the hand of the president thereof are hereunto affixed, this 26th day of October, A. D. 1868.

SELAH REEVE.
JOSIAH SNOW, *Trustee.*
D. A. GAGE, *President.*

Also introduced in evidence section 2 of chapter 131 of the Revised Statutes of Illinois, still in force.

Evidence closed.

Judgment.—After the evidence and arguments of counsel were concluded the court found the issues for the defendant and gave and entered judgment for defendant and against plaintiff for costs of suit, to which plaintiff duly excepted.

Bill of exceptions.—In due time and in due and proper form the entire record and evidence was preserved by bill of exceptions signed and filed.

Notice of appeal to the Supreme Court was property served and filed and appeal perfected.

The foregoing is a complete abstract of the entire record in this cause, including pleadings, evidence, and judgment entries, and the evidence in the cause was duly reported by short-hand reporter, his minutes certified and filed of record in the case, and a transcript thereof was by him made and filed therein.

Assignment of Errors.

1st. The court erred in admitting at the trial improper evidence on the part of the defendant in this:

a. That it admitted the alleged articles of incorporation of the plaintiff.

59 *b.* That it admitted the testimony of S. L. Glasgow as to the search by himself and others in the office of the clerk of the circuit court of Cook county, Illinois, for the original pleadings in the Terwilliger case; it also erred in denying the motion of plaintiff to strike out the said testimony and in omitting to strike out the same.

c. That it admitted in evidence the alleged copies of the alleged original pleadings filed in the Terwilliger case, as certified by A. H. Taylor, clerk of the supreme court of Illinois.

d. That it allowed in evidence the petition of the Great Western Telegraph Company, Harford, *et al.* for an order for accounting with Selah Reeve.

e. That it admitted the order of reference on said petition.

f. That it admitted the alleged copy of the so-called supplemental bill of Jones *et al.*

g. That it admitted the copy of an agreed state of facts which had been filed in the Counselman case.

j. That it admitted the copy of an agreement for the appointment of receiver October 7, 1874.

k. That it admitted a copy of the order appointing the receiver of plaintiff of October 7, 1874.

l. That it admitted the certificate of Henry Best, dated January 3, 1890.

m. That it admitted the copy of the decree appointing the receiver in the Kidder case.

n. That it admitted the copy of the resolution of the executive committee of the plaintiff of June 5, 1872.

o. That it admitted the copy of the proceedings at the meeting of the stockholders of the plaintiff on January 28th, 29th, and 30th, 1873.

p. That it admitted a copy of the pleadings, etc., in the case of Counselman *et al. vs.* Anderson *et al.* in the circuit court of the United States for the southern district of Iowa.

2. The court erred in entering judgment in favor of defendant and against the plaintiff for costs.

NEWMAN & BLAKE,
THOMAS J. SUTHERLAND,
Attorneys for Appellant.

60 Endorsed: Service acknowledged and copies received August 27, 1890. S. L. Glasgow, att'y for appellee.

61 & 62 And on the 26th day of September, 1890, the defendant filed in said supreme court an additional abstract, the same being in the words and figures following, to wit:

63 Service of this additional abstract acknowledged and copies received this 25th day of September, 1890.

NEWMAN & BLAKE,
Att'ys for Appellant.

In the Supreme Court of the State of Iowa, October Term, 1890.

THE GREAT WESTERN TELEGRAPH COMPANY, for the Use of ELIAS R. BOWEN, Receiver, Appellant,
vs.
HIRAM PURDY, Appellee.

Appeal from Des Moines county district court, Hon. Chas. H. Phelps, judge presiding.

Newman & Blake and Thomas J. Sutherland, attorneys for appellant; S. L. Glasgow and Thomas Hedge, attorneys for appellee.

Additional Abstract of Record and Argument for Appellee.

64 Additional abstract of record.

Appellee denies the sufficiency and correctness of the abstract of record filed herein by appellant in this: That said abstract of rec-

ord does not contain all the pleadings nor all the record nor all the evidence in the case; neither is the portion thereof contained in said abstract correct.

Petition.

On the 30th day of August, 1888, appellant filed his petition herein, stating his alleged cause of action as follows: That said plaintiff is a duly incorporated company and was so in the months of January and February, 1869; that on or about the 16th day of February, 1869, the defendant subscribed for fifty shares of the capital stock of said company of the face value of twenty-five dollars ($25.00) per share. A copy of said contract of subscription is hereto attached, marked Exhibit "A," and made part of this petition; that said subscription was required to be paid in installments, to wit, five per cent. of the amount paid in and the balance as the directors may from time to time order; that five per cent. installment was paid and the balance remains unpaid; that said company became largely involved in the work of constructing telegraph lines and was unable to pay its indebtedness, and various judgments were rendered against said company; that the creditors of said company commenced a suit in equity in the circuit court of Cook county, entitled Jeremiah Terwilliger *et al.* against The Great Western Telegraph Company *et al.*, for the appointment of a receiver, &c., and in said cause Elias R. Bowen was duly appointed receiver of said company and its assets, and in the further proceedings in said cause was ordered and directed by the court, by decree duly entered therein on or about the 10th day of July, 1886, to collect an assessment of thirty-five per cent. of the par value of each share of its capital
65 stock subscribed for for the purpose of paying the indebtedness of the company, which said thirty-five per cent. was duly assessed by said decree upon the subscribers of said company; that in pursuance thereof the said receiver has demanded of the defendant the thirty-five per cent. so assessed upon his stock so subscribed for, which demand has been neglected and the amount claimed is still unpaid.

EXHIBIT "A."

Exhibit "A," referred to in the foregoing petition, is the alleged copy of contract of subscription as found on pages 5 and 6, appellant's abstract.

Motion for More Specific Statement.

On the 10th day of November, 1888, appellee duly filed his motion for more specific statement, asking the court to require the appellant—

1st. To give the date on which the jugments referred to in his petition and each of them were rendered against said telegraph company and in what court said judgments were rendered, the amount thereof, and the name of the judgment plaintiff.

2nd. To give the date, month, and year at which said telegraph company became insolvent and unable to pay its indebtedness.

3rd. The date at which said telegraph company became insolvent and ceased to do and carry on its business.

4th. The date at which the suit of Jeremiah Terwilliger and others against said company *were* originally commenced and the date on which the receiver for said company was first appointed.

Said motion was in part sustained by the court, and on the 19th day of April, 1889, appellant duly filed the following:

66 *Amendment to Petition.*

By order of court for a more specific statement plaintiff amends his petition in this cause by the further allegation that the Great Western Telegraph Company became insolvent and unable to pay its indebtedness about the 7th day of October, 1874, and at or about the same date the said company ceased to carry on its business.

Demurrer..

On the 27th day of April, 1889, appellee duly filed the following demurrer to appellant's petition as amended:

1st. It appears from the face of said petition as amended that plaintiff's alleged cause of action accrued more than ten years prior to the commencement of this action; that said alleged cause of action, if any, accrued on or about the 7th day of October, 1874, and this action was not commenced until the 30th day of August, 1888.

4th. Said alleged cause of action is barred by the statutes of limitations.

5th. Said alleged cause of action is stale, and plaintiff has been guilty of laches.

On the 24th day of June, 1889, said demurrer was duly sustained by the court.

Amended Petition.

On the 15th day of September, 1889, appellant filed his amended petition herein, as found on pages two to five, inclusive, of appellant's abstract. But said amended petition as set out in appellant's abstract is not correct in this, the eighth and ninth lines from the top of page three of appellant's abstract should read as follows: "And in the year 1874 it had exhausted its assets then on hand and became insolvent and unable to pay its indebtedness and suspended business."

67 Further, in the eleventh line from the top of page four, appellant's abstract, there is a further omission from the original petition, and said line eleven and those immediately following should read as follows, to wit:

"Plaintiff further avers that the creditors brought suits against this plaintiff and recovered sundry judgments in the sum of more than two hundred thousand dollars ($200,000) on account of the construction of its telegraph lines, material furnished, labor performed, and money advanced in such construction," &c.

Answer.

On the first day of November, 1889, appellee duly filed his answer to plaintiff's petition and amended petition as follows:

1st. Defendant denies that he is indebted to plaintiff in the sum of four hundred and thirty-seven dollars and fifty cents ($437.50) or in any part thereof; denies that he is indebted to plaintiff as alleged in said petition and amended petition or in any other manner; denies that he is indebted to plaintiff upon the alleged subscription to the capital stock of said company, and denies that there are any sum or sums whatever of any kind or amount due and unpaid from plaintiff to any person or persons whomsoever.

Denies that the alleged suit of Jeremiah Terwilliger and certain other persons, stockholders of said company, complainants, against plaintiff and others, defendants, is now pending and undetermined in the circuit court of Cook county, State of Illinois, or in any other court; denies that said suit was pending and undetermined at the date of the alleged appointment of a receiver for said company, October 7, 1874; denies that the receiver for said company was appointed by the circuit court of Cook county, State of Illinois, in said suit of Terwilliger and others, complainants, and against
68 plaintiff and others, as defendants, and denies that said suit was pending and undetermined at that time.

Denies that the alleged order of assessment upon the stock and stockholders of said company was made in said cause of Terwilliger and others against plaintiff and others by said circuit court of Cook county, State of Illinois, and denies that said cause was pending and undetermined at the time of said alleged assessment, to wit, July 10, 1886.

Defendant denies that he was in any manner a party to the action or cause in which said alleged assessment of stock was made, and denies that he had any notice or information at the time of said alleged assessment or prior thereto that any such proceedings were pending or had.

Denies that at the date of defendant's alleged subscription to the capital stock of said company, to wit, February 16, 1869, the said company owned or had in its control any capital stock not already fully subscribed for and taken, and denies that at said date there was any such capital stock to be subscribed for by any one or that could be legally issued by said company if subscribed for.

Denies each and every material allegation contained in plaintiff's petition and amended petition.

2nd. For further answer defendant admits that he signed an instrument in writing, purporting to be a subscription to the capital stock of said company, similar to Exhibit "A," attached to plaintiff's petition, at the date and place therein mentioned, and avers that he has not sufficient information concerning the same to say whether Exhibit "A" is a true copy of the original or not, and therefore neither admits or denies the same, but leaves plaintiff to his proof.

Defendant avers that the said company was organized about
69 the month of December, 1867, in the State of Illinois, under the laws in force at that time in said State, known as the act of 1849, but defendant avers that said organization was fraudulent, and that said organization was a fraudulent organization at the time of its organization and ever afterwards.

That at the time of the organization of said company all the capital stock of said company was fully subscribed for and taken by the incorporators thereof, and that fact appears from the articles of incorporation of said company, then and there duly filed in the office of the secretary of state in and for the State of Illinois; that said articles of incorporation were made and executed on or about the second day of December, 1867.

That at the date of the alleged subscription by the defendant to said capital stock, February 16, 1869, the said company had no capital stock subject to subscription or which the said company could legally issue to subscribers therefor at that date; that defendant had no knowledge of that fact at the time of his alleged subscription, and said alleged subscription is therefore fraudulent, without consideration, void, and of no effect.

3rd. For further answer defendant avers that on the 25th day of March, 1868, a written contract was fraudulently entered into between the said company, through David A. Gage, its then president, and one Selah Reeve, one of the incorporators of said company, holding one hundred and seventeen thousand eight hundred and ninety-seven shares of the capital stock of said company, for the construction by Reeve of two thousand miles of line on the routes to be designated by the company, and wherein the plaintiff company agreed to issue and deliver to the said Reeve certificates for one hundred and twenty thousand shares of the capital stock of said company. At the same date of said agreement said Reeve assigned
to one Josiah Snow, an incorporator and the then secretary
70 and treasurer of said company, one hundred and seventeen thousand eight hundred and ninety-seven shares of the capital stock of said company, originally subscribed for by said Reeve, in trust to the said Snow to sell the same to such person or persons as he could procure to subscribe to the stock at the rate of ten dollars ($10.00) per share and pay over the proceeds to the said Reeve.

That the said Snow called upon this defendant and requested him to subscribe to said capital stock of said company, then and there representing to said defendant that he was the agent of said company to take subscriptions to the stock of said company, and defendant, relying upon such representations and believing the same to be true, then and there subscribed for fifty shares of said stock February 16th, 1869, at the place of his residence, to wit, the city of Burlington, State of Iowa. Defendant avers that such representations so made at the time by the said Snow were false, fraudulent, and untrue, and that the stock so subscribed for was part of the stock theretofore subscribed for and then owned and held by the said Reeve, whose agent the said Snow was at the time; that the stock then and there so subscribed for by defendant was the stock

of the said Reeve, and as between this defendant and the said company is fully paid up stock, and that no liability exists against this defendant and in favor of said company on account of said subscription.

Defendant avers that the said subscription to the capital stock of the said company by the said Reeve and the sale of the stock by Reeve or part thereof to this defendant was a fraud perpetrated upon him, this defendant, and upon the public, and has been so adjudged by the supreme court of the State of Illinois in the opinion and judgment by that court in the case of Terwilliger and others against said company and others, found in the 59th Illinois Reports,
71 pages 249 to 260, inclusive; that this defendant was a party complainant in said suit.

4th. For further answer defendant avers that the entire scheme of the organization of the Great Western Telegraph Company by Selah Reeve, Josiah Snow, David A. Gage, and other associates, and the subscription by them and each of them to the original stock of said company and the sale of the stock of Reeve to defendant and others, as hereinbefore stated in paragraph three, was a fraud perpetrated by said parties upon all such purchasers and upon the public, and that said contract of March 25th, 1868, between Reeve and the company and between Reeve and the said Snow, as trustee and agent for the sale of said stock, were fraudulent and have been so declared by the supreme court of the State of Illinois and set aside by said court as fraudulent by the opinion and judgment of that court, as found in the said 59th Illinois Reports.

That said judgment and opinion were rendered by said court in the case mentioned in plaintiff's petition, to wit, the case of Terwilliger and others against the said company, Selah Reeve, Josiah Snow, and others, this defendant being a party complainant in said action; that it was adjudged and decreed by said court in said cause that the said company issue certificates of stock to all subscribers who have paid the money for as many shares as they are entitled to by the money paid, reckoning forty per cent. paid upon twenty-five dollars as giving title to a share. Said judgment and decree of said court were duly rendered at the September term thereof, 1871.

That defendant has paid upon said subscription and had paid thereon prior to said judgment of the supreme court of the State of Illinois in said cause the sum of two hundred and seventy-five dollars ($275); that for said sum so paid defendant was and is
72 entitled, as per said decision of said supreme court, to fully paid up shares of said capital stock, and that from the time of said decision and judgment of said court, to wit, the month of September, 1871, the shares of the capital stock so subscribed for by defendant were and are fully paid up shares, and that there is nothing due and unpaid thereon.

That the circuit court of Cook county, State of Illinois, from which said cause had been appealed to said supreme court, resumed jurisdiction of said cause, on *procedendo* or remand from said supreme court, and on the 16th day of November, 1872, rendered a final de-

cree therein in conformity with the said opinion of the said supreme court and for costs against the defendants in said cause and awarded execution thereon.

That all questions, matters, and things involved in this action were fully and finally adjudicated by the said final judgments and decrees rendered by the said supreme and circuit courts of the State of Illinois in said cause of Terwilliger and others against plaintiff herein and others.

That it was also fully and finally adjudicated by the said judgments of said courts in the said cause of Terwilliger and others that the original capital stock of said plaintiff company was all fully subscribed for and taken by the incorporators of said company at the time of the incorporation of said company.

That the said company was fully reorganized on or about the month of February, 1873, on the basis of said final judgments and decrees of said supreme and circuit courts of the State of Illinois in the said Terwilliger case and as directed therein by the said supreme court, and said new organization then and there took possession of the property of said company and managed and directed the affairs of said company thereafter.

73 Defendant avers that plaintiff is estopped by said final judgments and decrees of said courts in the said Terwilliger case from maintaining this action and from recovery therein.

5th. For further answer defendant avers that the said cause of Terwilliger and others against this company and others, mentioned in plaintiff's petition, was finally determined by the supreme court of the State of Illinois at the September term of said court, 1871, and by the circuit court of Cook county, State of Illinois, on remand from said supreme court, on the 16th day of November, 1872; that at the date last mentioned a final decree was rendered in said cause by said circuit court in conformity with the opinion of said supreme court therein, and for costs against the defendants in said action, and execution awarded thereon; that at the date last mentioned said cause was finally determined and disposed of, so far as the rights of complainants were concerned.

Defendant avers that no receiver for said company was appointed at any time in said cause, and no such receiver was appointed by the court in said cause, at or before the final disposition thereof, as aforesaid.

Defendant avers that the alleged supplemental bill of J. M. W. Jones and others against said company and others was not filed in the circuit court of Cook county, State of Illinois, until the 9th day of February, 1874, nearly two years after the final disposition and termination of the said cause of Terwilliger and others against the said company and others.

That on the 7th day of October, 1874, an original bill against said company was filed in said circuit court by one Almon Kidder, asking that the affairs of said company be wound up, and for the appointment of a receiver; that on the 7th day of October, 1874,

74 a receiver for said company was appointed by a stipulation of certain parties filed in said court under said supplemental

bill and said original bill of the said Kidder, said stipulation being signed by E. A. Small for John Clark Hilton, Thomas J. Sutherland for Selah Reeve, Sleeper & Whiton for the Commercial National bank, Messrs. Bennett, Kretsinger & Vedder for the complainants, and Harding, McCoy & Pratt for the company.

That defendant was not a party to said supplemental bill, neither to the original bill filed by Almon Kidder, neither had he at any time notice of any such proceedings, neither did he appear therein or authorize any one to so appear for him.

That the original order indorsed by Judge Williams of the said circuit court, appointing said receiver in pursuance to said stipulation, is entitled in said supplemental bill, but as written upon the records it is erroneously and without authority entitled in the bill and supplemental bill of Terwilliger and the cross-bill of Reeve. Defendant avers that the title of Exhibit B attached to petition herein is incorrect, erroneous, and without authority in that respect.

That the cross-bill of Selah Reeve against said company and others, mentioned in said Exhibit B, was not filed in said court until the 21st day of September, 1874, said cross-bill only asking for an accounting, but for no receiver.

Defendant avers that under an act of the General Assembly of the State of Illinois entitled "An act concerning corporations," approved April, 1872, and which is still in force, a receiver appointed to wind up corporations cannot enforce the liability of stockholders unless the stockholders were parties to the suit in which the receiver was appointed. The supreme court of the State of Illinois has so
75 decided and so construed said act. A receiver was appointed for said company October 7th, 1874, after the taking effect of said act, and the defendant was not a party to the suit in which said receiver was appointed, and had no notice or knowledge thereof and never appeared therein or authorized any one to appear for him.

Defendant avers that he was not a party to the suit in which the order of assessment alleged in plaintiff's petition was made; that he had no notice or knowledge of said suit and never appeared therein and never authorized any one to appear for him; that defendant had no notice or knowledge of the application of said order of assessment, and was not present, neither was any one present for him; that he never had any notice or knowledge of any proceedings to obtain such order of assessment, and was not in any manner a party thereto or to the application therefor; that the application for the said order of assessment was made upon an unsworn and *ex parte* petition by the receiver, E. R. Bowen, and without notice to this defendant.

6th. For further answer defendant avers that prior to the commencement of this action all questions, matters, and things involved in this action were fully and finally adjudicated by the final judgment and decree rendered by the circuit court of the United States for the southern district of Iowa, central division, in a certain cause then pending in said court, wherein the plaintiff in this action and others were complainants and W. H. Anderson, this defendant, and others were defendants, No. 1957, equity; that said final judgment

and decree were rendered by said court in said cause on or about October 28th, 1885, and that plaintiff is estopped by said final judgment and decree from maintaining this action and from recovery therein.

7th. For further answer defendant avers that this action
76 was commenced on the 30th day of August, 1888; that plaintiff's alleged cause of action is founded upon an alleged written subscription by defendant to the capital stock of said company, made at Burlington, Iowa, February 16, 1869; that, as alleged in plaintiff's petition, the plaintiff company became insolvent and ceased to do or carry on its business October 7, 1874, and that at the date last mentioned said receiver was appointed; that on or about the 5th day of June, 1872, the then board of directors of said company duly ordered and directed that each holder of the stock of said company pay to said company, on or before the 12th day of July, 1872, all unpaid balances due said corporation company, as provided by the terms of the contract of subscription, and that the secretary of said company notify the said subscribers of said order and demand payment; that said order was then and there duly entered of record on the books of said corporation company.

That plaintiff's alleged cause of action, if any, accrued more than ten years prior to the commencement of this action; that plaintiff's alleged cause of action, if any, is barred by the statute of limitations.

8th. For further answer defendant avers that a certain action in equity, general No. 68898, was duly commenced in the circuit court of Cook county, State of Illinois, on or about the month of September, 1888, wherein Charles B. Farwell and others were complainants and this plaintiff and others defendants; that further proceedings were had in said action to the effect that on the 19th day of June, 1889, the defendant in that action and the plaintiff in this action was, as such receiver, enjoined and restrained, by order of said court, duly issued, from collecting the alleged assessment or any part thereof referred to in plaintiff's petition herein; that said order is still in full force and effect.

77 9th. For further answer defendant avers that the alleged claim of plaintiff is stale, fraudulent, and unjust.

Defendant asks judgment against plaintiff for costs.

Motion and Petition by Defendant for a Rule upon Plaintiff to Produce Certain Original Papers, Documents, and Books.

On the 22nd day of November, 1889, appellee duly filed his motion and petition for a rule upon the plaintiff to produce certain original documents, papers, and books, for the purpose of being inspected and copied by appellees, and for the purpose of being used as evidence on behalf of appellee at the trial of this cause, as follows:

Said petition duly contained all the necessary averments, showing the jurisdiction and right to such rule, describing the original documents, books, and papers asked for, and showing the materiality of

each one thereof to the issues joined in the case and what defendant expected to prove thereby.

The original documents, papers, and books asked for were as follows: The original articles of incorporation or charter of the said company, executed on the second day of December, 1867; the original written contract of date March 25, 1868, between Selah Reeve, an incorporator and stockholder of said company, and said company, through its then president, David A. Gage, for the construction of a large number of miles of line, and assigning to said Reeve 120,000 shares of the capital stock of said company; the original written contract of same date between Selah Reeve and one Josiah Snow, the then secretary and treasurer of said company, wherein the said Reeve assigned to the said Snow 117,897 shares of the capital stock of said company in trust, to sell the same at the rate of ten dollars ($10) per share and pay over the proceeds to said Reeve under said contract of Reeve aforesaid with the said company; the original written contract of date on or about March 26, 1868,
78 between said Reeve and Snow as said trustee, giving the said Snow irrevocable authority as trustee to sell said stock at ten dollars ($10) per share, less a commission of fifty cents per share allowed to agents, said trustee to pay the proceeds to said Reeve; the original book or books containing the original record of the proceedings and resolutions of whatever kind passed, adopted, and approved at the several meetings of the stockholders, board of directors, or officers of said company, and particularly the original book or books containing the written contracts, the original records thereof, and with reference thereto, as above stated, and particularly the original book or books containing the original record of the reorganization of said company and the election of new directors about the months of January and February, 1873; and particularly the original book or books of said company containing the original record of the resolutions passed by the board of directors or officers of said company on or about the 5th day of June, 1872, directing that the stockholders of said company pay all unpaid balances on their stock subscriptions on or before the 12th day of July, 1872, &c.

Said petition was duly verified by the appellee, Hiram Purdy, November 22, 1889.

Answer to said Petition.

On the 2nd day of December, 1889, Mr. Thomas J. Sutherland, as general attorney for said receiver, filed the following answer:

That Thomas J. Sutherland is the general attorney and solicitor for E. R. Bowen, &c.; that he has read the petition of Hiram Purdy filed in said cause for the production of certain books and papers and knows the contents thereof; that he knows the contents of the various books and papers of the said company now in the
79 possession of said receiver; that the said receiver has not in his possession or control any books or papers as are described in said petition except the secretary's book or record book kept by

said company subsequent to the month of October, 1871; that if any of said books and papers mentioned in said petition ever were in the possession of the company, affiant and said receiver are uninformed.

Duly verified by the said Thomas J. Sutherland November 26, 1889.

Order.

On the 21st day of September, 1889, the court duly made an order directing the plaintiff to permit the defendant or his attorney to inspect the original book or books mentioned in said petition and to take copy or copies thereof, and further directing the plaintiff to produce at and upon the trial of this cause the said original written contracts of date March 25th and March 26th, 1868, or show due cause why said contracts are not produced at said trial.

Answer to Amendment to Petition.

On the 1st day of March, 1890, appellee duly filed his answer to the amendment to appellant's amended petition as follows:

1st. Defendant reaffirms and pleads hereto all the allegations of his original answer filed herein, except on page nine of said answer defendant corrects a mistake in the date of the filing of the alleged supplemental bill and says that the same was filed September 19th, instead of February 9th, 1874, as stated in said answer.

Denies that defendant paid the sum of two hundred and fifty dollars ($250.00) under said decree of October 16th, 1879, as alleged in said amendment; denies that he ever paid any sum under any assessment decree or assessment of any kind; denies that he ever paid any sum whatever upon his alleged subscription after
80 he became a party to the original action of Terwilliger and others against said company and others, which was some time in the year 1869; denies that said cause of Terwilliger and Hiram Purdy and others against said company and others was pending in the year 1879, or that any assessment in 1879 or at any other time was made in said cause.

Denies that all or any of the proceedings referred to in said amendment and in said amended petition were had in said cause of Terwilliger, Hiram Purdy, and others against said company and others in the circuit court of Cook county, Illinois; denies that said cause is now pending, and denies that said cause was pending at the time or dates that said alleged proceedings were had; denies that the alleged supplemental bill and cross-bill were filed in said cause, and denies that said cause was pending at the date of the filing of said supplemental and cross bills; denies that said receiver filed his petition and motion in said cause for the alleged assessment, and denies that said cause was then pending; denies each and every material allegation contained in said amendment.

2nd. Defendant avers that said cause of Terwilliger and others against said company and others was finally determined on the 16th day of November, 1872; that at the date last mentioned a final de-

cree was rendered in said cause by said circuit court of Cook county, Illinois, in conformity with the opinion of the supreme court of the State of Illinois therein and for costs against the defendants in said action and execution awarded thereon, which was paid January 7, 1873; that at the date last mentioned said cause was finally determined and disposed of so far as the rights of complainants, including this defendant, were concerned.

That this defendant was not a party to said supplemental
81 bill, neither to the alleged cross-bill of Selah Reeves, neither was he a party to the proceedings wherein the alleged appointment of a receiver for said company was had, nor to the proceedings wherein said alleged assessment or assessments were made, neither had he at any time notice of any such proceedings, neither did he ever appear therein or authorize any one to appear for him; that the court in which said proceedings were had had no jurisdiction of this defendant and said proceedings were null and void as to this defendant and he is not bound thereby.

3rd. That it is provided by the laws of the State of Illinois, to wit, by act of the General Assembly of said State entitled "An act concerning corporations," approved April 18, 1872, and which took effect and became in force July 1, 1872, as follows:

SEC. 25. "If any corporation or its authorized agent shall do or refrain from doing any act which shall subject it to the forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for payment of money after demand made by the officers, to be returned no property found, or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time or liable in any way for the debts of the corporation by joining the corporation in such suit, and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such duties or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders, and courts of equity shall have full power, on good cause shown to dissolve or close up the business of any cor-
82 poration, to appoint a receiver therefor who shall have authority by the name of the receiver (giving the name) to sue in all courts, and do all things necessary to closing up its affairs, as commanded by the decree of said court."

The said act took effect and became a law in said State of Illinois, as above stated, July 1, 1872, and is now and has been ever since in full force and effect. Said act was in full force and effect at the time the alleged proceedings for the appointment of said receiver herein were commenced, and said act was in full force and effect at the time of the alleged appointment of a receiver herein and at the time of the making of the alleged assessment herein, and said proceedings were had under said act and governed thereby.

That under said act it was and became necessary to make this

defendant a party to said proceedings and each of them in order to in any way affect or conclude him by such proceedings or to render him in any way liable thereby. This defendant was not a party to said proceedings or either of them and no notice of said proceedings or either of them was ever given to or served upon this defendant, and this defendant never appeared in said proceedings or either of them, nor authorized any one to appear for him, and this defendant had no knowledge of said proceedings or either of them.

Defendant therefore avers that he is not concluded by said proceedings or either of them, neither is he bound thereby. Plaintiff has no right to maintain this action against the defendant.

Evidence for Plaintiff.

Thomas J. Sutherland, witness: Defendant objected to the alleged contract of subscription being offered in evidence by plaintiff, for the reason that the same is incompetent, irrelevant, and im-
83 material. (Objection overruled and defendant excepted.) Said contract will be found on pages 5 and 6, appellant's abstract.

Defendant objected to the certified copy of the original decree of assessment in the circuit court of Cook county, Illinois, offered in evidence by plaintiff, for the reason that said decree is incompetent, irrelevant, and immaterial, and for the further reason that it appears on the face of the decree that this defendant was not a party thereto. (Objection overruled and defendant excepted.) Said decree will be found on pages 6 to 12, appellant's abstract.

Defendant objected to the alleged demand upon defendant of August 29, 1888, offered in evidence by plaintiff, for the reason that the same is incompetent, irrelevant, and immaterial, and for the further reason that defendant was not a party to the proceedings in which said original assessment was made. (Objection overruled and defendant excepted.) Said demand will be found on pages 18 and 19, appellant's abstract.

Same objections were made by defendant to the statement by witness that the amount due from defendant is four hundred and seventy-five dollars and seventy-five cents ($475.75), and said objections were overruled and defendant excepted.

Defendant objected to the introduction in evidence by plaintiff of the copies of the decrees of the circuit court of Cook county, Illinois, of date November 16, 1872, marked Exhibit "B," and January 28, 1873, marked Exhibit "D," for the reason that the same and each of them are incompetent, irrelevant, and immaterial, said decrees having been made fourteen years prior to the alleged decree of assessment.

D. P. STUBBS, witness: I had the receipts with me for the money paid to Mr. Purdy and surrendered them and obtained a
84 certificate of the stock from the company for twenty-seven and one-half shares for Mr. Purdy. The certificate was handed to me by J. R. Doolittle, secretary of the company. It was delivered to him in January, 1883, after the decree. I surrendered

Mr. Purdy's receipts for money paid, and voted his stock. The secretary of the company had the stock book present and issued us stock—issued stock to every person that showed receipts for payment of money, and the amount of stock was issued to them. I surrendered receipts for money paid by Mr. Purdy to the amount of two hundred and seventyfive dollars ($275); it was at a meeting of the stockholders; it was issued in pursuance of the order of the court. The meeting was in Chicago at some hall. I don't now recollect. I had authority from Mr. Purdy and voted his stock. I receipted for the stock on the stock book of the company. I was present at the time for Mr. Purdy, in Iowa, and Mr. Van Buren was his attorney in Illinois. Mr. Purdy is the same one, or the same person, that was a party to the Terwilliger bill. The last time I certainly recollect of seeing the certificate of stock was the time my deposition was taken in the case that was pending in the Federal court at Des Moines. I have a copy of that deposition, and can refresh my recollection with it. That was the latter part of 1885.

Defendant's Evidence.

Defendant introduced in evidence a notice in writing to plaintiff to produce upon the trial of this cause the following original books, records, papers, and documents, to wit, the original articles of incorporation or charter of the said Great Western Telegraph Company, executed on or about the 2nd day of December, 1867; the original written contract of date March 25, 1868, between Selah Reeve and said corporation company, through its then president, David A. Gage, for the construction of a large number of miles of line, and assigning to the said Reeve one hundred and twenty
85 thousand shares of the said capital stock of said corporation company; the original book or books containing the original record of the proceedings and resolutions of whatever kind passed, adopted, approved, had, and done at the several meetings of the stockholders, board of directors, or officers of said corporation company, and particularly the original book or books containing the written contract, the original record thereof, and with reference thereto between Selah Reeve and said company, of date March 25, 1868, as above stated, and particularly the original book or books containing the original record of the reorganization of said corporation company and the election of new directors and officers by the stockholders thereof about the months of January and February, 1873, and particularly the original book or books of said corporation company containing the original record of the resolutions passed by the board of directors and officers of said company on or about the 5th day of June, 1872, directing that the stockholders thereof pay all unpaid balances on their stock subscriptions on or before the 12th day of July, 1872, &c., said defendant desiring to offer said original papers, documents, contracts, books, and records in evidence upon the trial of said cause, and in case of refusal or neglect to furnish the same defendant will offer secondary evidence of the contents thereof at the trial of said cause.

Service of the above notice and the receipt of the copy of the same duly acknowledged the 22nd day of November, 1889, by Messrs. Newman & Blake, attorneys for plaintiff.

Defendant introduced in evidence a notice in writing to plaintiff to produce certain original contracts and papers in the trial of this cause, to wit, the original contracts, of date March 25th and March 26, 1868, made between Selah Reeve and Josiah Snow, then secretary and treasurer of said company, wherein the said
86 Reeve assigned to said Snow one hundred and seventeen thousand eight hundred and ninety-seven shares of the capital stock of said company originally subscribed for by said Reeve in trust to the said Snow to sell the same to such persons as he could procure to subscribe to the stock and pay the proceeds to the said Reeve, giving to the said Snow irrevocable authority as trustee to sell said stock at ten dollars ($10) per share, less a commission of fifty cents to agents, the proceeds of such sale to be paid to the said Reeve; also the original resolutions passed by the directors and officers of said corporation company on or about the 5th day of June, 1872, directing that the stockholders of said company pay all unpaid balances on their stock before the 12th day of July, 1872, and directing the secretary and treasurer of said company to collect the same. Defendant desires to offer said original contracts, papers, and resolutions in evidence upon the trial of said cause, and in case of refusal and neglect to furnish the same he will offer secondary evidence of the contents thereof at the trial of said cause.

Service of the above notice and receipt of a copy thereof was duly acknowledged on the 24th day of December, 1889, by Messrs. Newman & Blake, attorneys for plaintiff.

Statement here made by Mr. T. J. Sutherland as follows: None of the papers mentioned in this notice nor anything like them are in our possession. Search has been made for these papers and we have none except the secretary's book. In the fire of 1871 the papers of the company were burned. Of the contents mentioned we have none at all.

Articles of Incorporation.

Defendant here introduced in evidence a duly certified copy
87 of the articles of incorporation of the Great Western Telegraph Company, of date December 2, 1867, duly certified by I. N. Pearson, secretary of state of the State of Illinois, and by the Hon. Jos. W. Fifer, governor of said State, November 8, 1889, with the great seal of the State of Illinois affixed.

Said articles of incorporation were duly filed in the office of the secretary of state for the State of Illinois July 17, 1868.

Said articles of incorporation will be found on pages 26 to 30, inclusive, appellant's abstract.

Certificate.

Defendant here offered in evidence the certificate of Henry Best, clerk of the circuit court of Cook county, State of Illinois, and the

keeper of the records and seal thereof, of date January 3, 1890, and duly certified by the Hon. M. F. Tuley, chief justice of the said court, with the seal of said court affixed, stating that at the request of S. L. Glasgow, attorney, the said clerk had directed and caused diligent search to be made among the records and files in the office by F. H. Klein, one of the employés of the clerk in said office, for the original bill of complainant, amendment thereto, answers, and replications filed in this office in a certain cause, wherein Jeremiah Terwilliger and others were complainants and The Great Western Telegraph Company and others defendants, No. 4884, chancery, and that after full, complete, and diligent search in his office as aforesaid neither of said papers or pleadings or any part thereof could be found, and to the best belief of said clerk the same were burned at the great fire in the city of Chicago, in the month of October, 1871.

Said certificate was identified by the reporter as Exhibit
88 "I." Plaintiff objected to the introduction of this certificate, and his objections were sustained, and defendant excepted.

S. L. GLASGOW, duly sworn, testified as follows:

As attorney for defendant in this cause, I went to the clerk's office of the circuit court of Cook county, in the State of Illinois, city of Chicago, on or about the second day of January, 1890. I was there also some two or three weeks before that for the purpose of obtaining certified copies of the original bill of complainant and amendment thereto, answers and replication, &c., in the case of Terwilliger and others against The Great Western Telegraph Company and others, No. 4884, heretofore pending in that court. I found an entry on the clerk's docket of the date of the filing. All of these papers of which I wished a copy were, as I supposed, in charge of the clerk or deputy clerk in charge of those records and rooms. A Mr. Klein, at work there, was told by some one under whose charge he was to make a search for those papers. We searched two days the first visit and two days the second visit and went through five boxes of papers labeled as papers in this Terwilliger case. We could not find any of those papers in that office or amongst those files or in those boxes. I then asked for this certificate, which was given me (the same being certificate above mentioned). I also called upon a Mr. Williams or Wilson, clerk in Judge Tuley's room, chancery clerk, and asked him, made inquiry of him, about these boxes, and the boxes were turned over to us and none of the papers asked for could be found.

Cross-examination by Mr. SUTHERLAND:

The extent of my search was four days. I looked at the clerk's docket in which he entered the filing of the papers. I did not see any of the attorneys and ask them if they had any papers. On my second visit I think I asked you for the contracts and the
89 supplemental bill. I think I did ask you for the supplemental bill in connection with the contracts. I did not ask you for any of the other pleadings. I did not know you were the

attorney in the Terwilliger case. I thought you were the attorney for the receiver. I went to Messrs. Tenny, Bashford & Tenny for those papers. I did not see your name amongst the old Terwilliger papers; there were none of them there. I did not see your name in any of the five boxes. I was not looking for your name. I did not find your name as solicitor for Selah Reeve until after 1874; Mr. Van Buren was the only attorney I knew by name; the original papers were not there, and I never saw who were the attorneys until I got the records from the supreme court at Ottawa, not long ago. I did not know that it was customary for attorneys and solicitors to take papers from the office of the clerk and not give their receipts therefor. I saw a lot of receipts there in the book upon the table, and I looked at nearly every name in it to see who had those papers prior to the fire, but I could not find any receipt for those papers. I looked that book through, name by name. I was looking for all the original papers in the case prior to the decree filed in the supreme court of the State of Illinois. I looked for this supplemental bill that was filed. I saw an order for a restitution of the original papers. I asked the clerk if it ever had been complied with, and he said "No."

At the second visit, in January, 1890, I made a search with Mr. Klein through all the papers for the original of this supplemental bill filed by J. M. W. Jones and others September, 1874, and I could not find the original anywhere, and I asked Messrs. Tenny, Bashford & Tenny if they had it. I asked Mr. Bennett, who was a party to the supplemental bill, if he had the original or a copy, and he said "No." I could not find the original or any copy of that supplemental bill.

90 Duly certified copy of the original bill of complaint, exhibits and amendments thereto, the several answers to said bill, and amendments and replication to said answer in the case of Terwilliger and others against The Great Western Telegraph Company and others, in the circuit court of Cook county, State of Illinois.

STATE OF ILLINOIS, } *ss*:
Cook County, }

Pleas before the honorable the judges of the Cook county judicial circuit of the State of Illinois, at a term of the circuit court of Cook county begun and held at the court-house, in the city of Chicago, in said county, on the 20th day of March, in the year of our Lord one thousand eight hundred and seventy-one.

Present: Honorable Erastus S. Williams, chief justice of the circuit court of Cook county, in the State of Illinois; W. W. Farwell, Henry Booth, John G. Rogers, judges; Timothy M. Bradley, sheriff of Cook county.

Attest: NORMAN T. GASSETTE, *Clerk*.

Be it remembered that heretofore, to wit, on the 20th day of November, A. D. 1869, Jeremiah Terwilliger, by E. Van Buren, his solicitor, filed in said court his certain bill; which bill is in the words and figures following, to wit:

To the Hon. E. S. Williams, judge of the circuit court of Cook county, in chancery sitting:

Your orator, Jeremiah Terwilliger, who files this bill in behalf of himself and all others, the shareholders and subscribers to stock of the association or corporation called the Great Western Telegraph Company, except those who are made defendants, show- to your honor that on the 2nd day of December, A. D. 1867, Josiah Snow, Selah Reeve, and David A. Gage, all of the city of Chicago,
91 in the county of Cook, united and associated themselves together, under the act of the legislature of the State of Illinois passed February 9th, 1849, and became a body politic and corporate, &c.

That the terms and conditions of said organization are embraced in their said certificate, a copy of which is hereto annexed, marked "Exhibit A," and made a part of this bill of complaint.

That your orator on or about the 11th day of May, 1868, subscribed for one hundred shares of said stock at twenty-five ($25) dollars a share, such subscription being made upon a printed subscription list, a copy of which is hereto annexed, marked "Exhibit B," &c.; that your orator is informed and believes that after the said Josiah Snow, David A. Gage, and Selah Reeve had elected themselves directors of said company and David A. Gage president and Josiah Snow secretary an agreement was then made by and between said David A. Gage as president of said company and Josiah Snow as secretary thereof with Selah Reeve by which they assigned and transferred to said Selah Reeve all the entire capital stock of said company, and by which agreement said Selah Reeve was to build the lines of said company at the rates mentioned in said contract, and said Reeve should be at liberty to sell the stock and with the avails thereof pay himself for erecting said poles, &c.; that in pursuance to said agreement the said entire capital stock was transferred to the said Selah Reeve.

Then follow allegations of conspiracy, fraud, &c.

An accounting is asked for, and that the amount paid by each subscriber be ascertained, and that certificates of full-paid stock be issued to subscribers for the money paid, and that the contracts or arrangements made between Gage, Snow, and Selah Reeve may be declared fraudulent and void, vacated, and set aside, with the usual prayer of general relief.

Duly verified by J. M. Terwilliger November 19, 1890.

92 *Answer of Selah Reeve to said Bill.*

This respondent admits that on or about the 26th day of March, 1868, an arrangement was made by this respondent with the Great Western Telegraph Company by which the entire capital stock of

said company was assigned to this respondent, but at the same time this respondent reassigned the whole of the stock to Josiah Snow in trust to be sold and the proceeds thereof to be applied to the building of the telegraph lines.

Then follows answer to the other allegations in the bill, duly verified by Selah Reeve January 14, 1870.

Joint Answers of The Great Western Telegraph Company, David A. Gage, and Josiah Snow, Defendants, to said Bill.

They admit the organization of said company by them the 2nd day of December, 1867; admit that David A. Gage, Josiah Snow, and Selah Reeve appointed themselves directors and officers of said company, and said defendants admit that on or about the 26th day of March, 1868, an arrangement was made by the Great Western Telegraph Company with the defendant Selah Reeve by which the entire capital stock of said company was assigned to the said Reeve in consideration of his agreement to build the lines of said company, &c., as stated in said contract, and at the same time the whole of the stock was assigned to him, Reeve; was by him assigned to Josiah Snow in trust to be sold at ten dollars ($10) per share and the proceeds thereof to be applied to the building of the telegraph lines of said company.

Then follow allegations in answer to other portions of the bill.

Duly verified by David A. Gage as president and Josiah
93 Snow as secretary of the Great Western Telegraph Company and by each of them individually January 27, 1870.

Replications were duly filed to said answers on the 4th day of January, 1871.

Certificate.

State of Illinois, Supreme Court, Northern Grand Division.

I, Alfred H. Taylor, clerk of the supreme court for the northern grand division for the State of Illinois and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of the original bill, exhibits and amendments thereto, the several answers to said bill, and amendments and replications to said answers contained in a certified transcript of the record and proceedings of the circuit court of Cook county, Illinois, in a certain cause entitled in this court Jeremiah Terwilliger against The Great Western Telegraph Company *et al.*; which said transcript aforesaid was filed in this office on the 11th day of September, 1871.

Witness my hand and the seal of said supreme court, at Ottawa, in said State, this 19th day of November, 1889.

[SEAL.] A. H. TAYLOR,
Clerk Supreme Court.

Then follows the certificate of Simeon P. Shope, chief justice of the supreme court of the State of Illinois, that the foregoing certificate of Alfred H. Taylor is in due form of law, and that the said

Taylor is and was the clerk of said supreme court, and that his signature is genuine.

Dated November 27, 1889.

Then follows the certificate of said Taylor, clerk, of date November 29, 1889, to the effect that the signature of Hon. Simeon P. Shope, chief justice of said court, to the preceding certificate is genuine, and that he was then and is chief justice of said supreme court.

94 *Deposition of Ingolf K. Boyeson.*

Defendant then introduced and read the deposition of Ingolf K. Boyeson, containing the written contracts thereto attached as "Exhibits A, B, and C," which are found on pages 33 to 43, inclusive, appellant's abstract.

Appellant, in his argument-in-chief, at the bottom of page 69 withdraws his objection to the introduction of this deposition and of said contracts.

Opinion of Supreme Court of Illinois.

Defendant then introduced in evidence the opinion of the supreme court of the State of Illinois in the case of Jeremiah Terwilliger and others against The Great Western Telegraph Company and others, reported in vol. 59, Illinois Reports, pages 249 to 261, inclusive. This opinion will be found in full in the volume of reports referred to, and reference is respectfully made to the same, in lieu of printing said opinion at length in this abstract.

Final Decree of Circuit Court of Cook County, Illinois.

Defendant introduced in evidence a duly certified copy of the final decree rendered by the circuit court of Cook county, Illinois, November 16, 1872, in the case of Jeremiah Terwilliger and others against The Great Western Telegraph Company and others, No. 4884, chancery; also a satisfaction of said decree and judgment on the margin thereof, January 7, 1873.

Duly certified November 8, 1889, by Henry Best, clerk of said court, with seal attached, and attested by a certificate in the usual form, made by the Hon. M. F. Tuley, chief justice of said court, November 8, 1889.

Said decree is found at length on pages 20 to 24, appellant's abstract.

95 Defendant then introduced in evidence an order made by the trial of court below in this cause December 21, 1889, directing plaintiff to produce upon the trial of this cause certain original documents, contracts, papers, &c., therein mentioned.

The terms of said order will be found on page 17, *ante*, of this additional abstract.

Certified Copy of Petition of Great Western Telegraph Company and Others against Selah Reeve.

STATE OF ILLINOIS, }
Cook County. }

Circuit Court. In Chancery.

JEREMIAH TERWILLIGER *et al.*, Complainants,
vs.
GREAT WESTERN TELEGRAPH COMPANY, DAVID A. GAGE, JOSIAH SNOW, and SELAH REEVE. } No. 4884.

To the honorable judges of the circuit court of the county of Cook:

The petition of The Great Western Telegraph Company, one of the defendants in the suit above entitled, and A. C. Kellogg and W. B. Harford, two of said complainants, respectfully show- to this court and allege—

That pursuant to the decree of this court rendered in this cause on the 16th day of November, 1872, an election has been duly called and held of a new board of directors of the said Great Western Telegraph Company, under the direction and limitations prescribed in and by said decree.

That a majority of all the shareholders of said company who, under said decree, were entitled to vote at said election were either present in person or were represented by their proxy, duly authorized, and took part in said election; that said election was adjourned from day to day and was completed and the votes were fully canvassed and the result was declared on the 30th day of January, 1873, whereby it appeared that the following stockholders of said company were chosen by a very large majority of the votes cast at such election as directors of said company, to wit:

96 A. H. Bliss, John I. Bennett, and Jesse O. Norton, of Chicago, Illinois; Joshua Stark, of Milwaukee, Wisconsin; C. H. More, of Clinton; R. B. Tracy, of Princeton; D. C. Farrell, of Peoria, in Illinois; Anthony W. Street, of Council Bluffs, in the State of Iowa; James E. Boyd, of Omaha, in Nebraska; C. N. Rice, of Topeka, in Kansas, and Howard N. Holden, of Kansas City, Missouri.

That on the 4th day of February following said election said newly elected directors met and organized by the election of Joshua Stark as president, James E. Boyd as vice-president, O. D. Bond as secretary, Mervin Tabor as treasurer, A. H. Bliss as general superintendent, and John I. Bennett as attorney, and the appointment of an executive committee of the board, of which the president is chairman; that as soon as said organization was completed said newly elected board of directors invited said defendant Selah Reeve to meet them with a view of an amicable settlement with him of the matters of difference between him and said telegraph company; that in response to such invitation said Reeve communicated to said board a statement which he claimed to embrace the sum of all the payments

he had received from said company for construction of telegraph lines under his contracts referred to in said decree or otherwise, but gave no information as to the actual cost of the construction of said lines or the amount expended by him thereon; that the officers of said company, under the direction of said newly elected board of directors, have endeavored to ascertain the cost of said telegraph lines constructed by said Reeve as a necessary step toward effecting such amicable settlement; that for that purpose they have examined all the books and accounts to which they could gain access and, finding no account of such costs therein, they have ap-
97 plied to said Reeve and demanded from him a statement of the actual cost of such lines, being his expenditure in constructing the same, at the same time informing him that their object was to make an amicable settlement with him on the basis of the reasonable cost of such construction and a reasonable compensation for his time and labor, as directed in and by said decree.

That said Reeve utterly refused and still refuses to give such statement or to furnish any information as to the amount expended by him for such construction, and also declined utterly to make any proposition for an amicable settlement with said newly elected board except upon a basis of his fraudulent contracts, but distinctly declared to the president of said board, in answer to said demand, that he preferred to have the court make a settlement for him, as provided in and by said decree; that your petitioners, said newly elected board of directors, have done all they could to effect such amicable settlement with said Reeve, and have failed by reason of the refusal of said Reeve, &c.; that while this cause was pending in the supreme court on appeal said Reeve and his associates under the fraudulent scheme set out in the pleadings and proofs in this cause continued to execute the same and treat the said contracts between the said Reeve and the company as valid and binding and continued to sell the stock and collect money from subscribers to stock in furtherance of said fraudulent scheme.

Your petitioners further show that up to the date of said decree of November, 1872, there had been issued and disposed of by said Selah Reeve and his associates in his said fraudulent scheme pretended certificates of stock to which they affixed the seal of said company, including in the whole, as your petitioners are informed and believe, thirty thousand shares and more at ten dollars ($10.00) per share, amounting to more than three hundred thousand
98 dollars; all of which was subject to the disposition of said Selah Reeve, and was by him disposed of in such manner as it pleased him.

Your petitioners therefore pray that an order may be made herein allowing your petitioners, said company, to become a complainant in this suit, and allowing it as such to apply to this court for such order or decree at the foot of said decree in this suit rendered November 16th, 1872, as shall be necessary, and that an order of reference be made to a master in chancery to ascertain and report to this court as nearly as possible the cost of all telegraph lines constructed and partially constructed by the defendant Selah Reeve

for said telegraph company to the date of said decree of November 16th, 1872, and also what would be a reasonable compensation for the time and labor of said Reeve and the amount of money and stock received from subscribers, and that said master state an account, and that a decree may be entered against said Selah Reeve for any excess of money, stock, or other property received as aforesaid, and that all papers, accounts, bills, and documents, vouchers, &c., under the control of Selah Reeve and his codefendants Josiah Snow and David A. Gage be ordered produced before said master, and that said Selah Reeve be required to furnish said master a detailed and itemized statement of his expenditures in the construction of said telegraph lines, &c., and for such other and further relief as may be proper and just in the premises.

(Signed) THE GREAT WESTERN TELEGRAPH CO.
JOHN I. BENNETT, *Its Solicitor.*
A. C. KELLOGG.
W. B. HARFORD.
JOHN I. BENNETT.

This petition was duly verified by Joshua Stark, president of the Great Western Telegraph Company, March 4, 1873, and filed in the office of the clerk of said court March 5, 1873.

JACOB GROSS, *Clerk.*

99 Duly certified by Henry Best, clerk of the circuit court of Cook county, Illinois, to be a true, perfect, and complete copy of the original petition filed in said court March 5, 1873, in the cause of Jeremiah Terwilliger *et al. vs.* The Great Western Telegraph Company *et al.;* said certificate dated the 4th day of January, 1890, at Chicago, in said county, with the seal of the court affixed. Said certificate attested in due form, of date January 4, 1890, by the Hon. M. F. Tuley, chief justice of said court.

Order of Reference under said Petition of Date March 8, 1873.

And now, on this day, comes the Great Western Telegraph Company, by Joshua Stark, its president, and A. C. Kellogg and W. B. Harford, by John I. Bennett, their solicitor, and this cause coming on to be heard upon the motion of said company and said Kellogg and Harford, heretofore herein filed, for a reference of this cause to a master for an accounting in accordance with the prayer of the petition herein filed; and thereupon the defendant Selah Reeve moves the court that he have leave to file a cross-bill in this cause, and that the same be continued for such time as shall be sufficient to enable him to file such cross-bill, and in support of said motion files his affidavit herein; which motion is denied by the court, to which the said defendant Selah Reeve, by his counsel, excepts; and the court being fully advised, and it appearing to the court from said petition that in pursuance to the said decree of this

court entered on the 16th day of November, 1872, that an election was called and held of a new board of directors of the Great Western Telegraph Company under and in compliance with the terms of said decree, and that said election resulted in the choice of a new board of directors on the 30th day — January, 1873;
100 that said newly elected board of directors have organized and elected its officers, and since said election of said board the said directors have attempted to affect an amicable settlement with said defendant Selah Reeve, such as would be acceptable to this court, and have been unable to effect such settlement with said Reeve, as required by said decree, and it has become necessary that said settlement be had with the court—

The court doth therefore order, adjudge, and decree that this cause be, and the same is hereby, referred to Chauncey T. Adams, one of the masters in chancery of this court, to ascertain and report to this court, with all convenient speed, as nearly as possible, the cost of all the telegraph lines controlled and partially constructed by the defendant Selah Reeve for said telegraph company up to the date of said decree of November 16th, 1872, what sum would be a reasonable compensation for the time and labor of said Reeve, and what amount of money, stock, or other property he shall or *or* may have received from said company up to the date of said decree, and said master will state an account between said company and said Reeve, etc., and said Reeve is ordered to produce before said master all books, papers, notes, or other written evidence, etc.

Duly certified by Henry Best, clerk of the circuit court of Cook county, Illinois, to be a true, perfect, and complete copy of the original order made and entered of record in said court on the 8th day of March, 1873, in said cause of Terwilliger and others *vs.* The Great Western Telegraph Company and others; said certificate dated January 4th, 1890, with the seal of said court affixed.

Said certificate attested in due form January 4th, 1890, by the Hon. M. F. Tuley, chief justice of said court.

101 Duly certified copy of the supplemental bill of J. M. W. Jones, John I. Bennett, Anthony W. Street, Alexander Street, and Monroe L. Hayward *vs.* Joshua Stark, Abel H. Bliss, B. F. Allen, and Orville D. Bond, impleaded with the Great Western Telegraph Company, filed in said circuit court of Cook county, State of Illinois, September 19, 1874, in the case of Jeremiah Terwilliger and others *vs.* The Great Western Telegraph Company and others; also duly certified copy of agreed statement of facts filed in the office of the clerk of the circuit court of the United States for the southern district of Iowa, central division, on or about October 20, 1885, in a certain cause then pending in said court wherein Charles Counselman *et al.* were complainants and William H. Anderson *et al.* defendants, No. 1957, equity, to which agreed statement of facts said supplemental bill was annexed as Exhibit No. 3, said agreed statement of facts being signed by the parties to said cause.

In the Circuit Court of the United States, Southern District of Iowa, Central Division. In Equity.

CHARLES COUNSELMAN *et al.*
vs.
WM. H. ANDERSON *et al.*
} No. 1957. Equity.

It is hereby stipulated that upon the final hearing of this cause the following statement of facts may be read in evidence, subject to objections for irrelevancy and immateriality:

1st. That the complainants were at the commencement of this suit and still are citizens of the State of Illinois, and that all of the defendants represented by counsel who signed this stipulation were at the bringing of said suit and still are citizens of the State of Iowa.

* * * * * * * *

3d. That on the 19th day of November, 1869, Jeremiah Terwilliger and others filed their bill in chancery in the circuit
102 court of Cook county, Illinois, against the Great Western Telegraph Company, David A. Gage, Josiah Snow, and Selah Reeve, and reference is made to the opinion of the supreme court of Illinois on appeal in said cause, reported in the Fifty-ninth Illinois Reports, pages 249 to 260, inclusive.

September 27, 1874, leave to Selah Reeve to file cross-bill.

That on the 19th day of September, 1874, a supplemental bill was filed in said cause, a copy of which is appended as Exhibit No. 3; that on October 12, 1874, the Great Western Telegraph Company and others filed an answer to said supplemental bill, etc.

That on the 9th of October, 1874, Almon Kidder filed in the circuit court of Cook county, Illinois, a creditor's bill against the Great Western Telegraph Company, and said company appeared therein October 13, 1874, and order made appointing O. H. Horton receiver.

Proceedings in above cases were carried on separately until June

25, 1875, after which papers filed were entitled both cases, but entered on the docket in the Terwilliger case.

That the aggregate of claims against said company is two hundred and seventy-one thousand two hundred and forty-nine dollars and sixty-two cents (271,249.62), and the claim of Selah Reeve is one hundred and sixty-one thousand three hundred and thirteen dollars and eighty-five cents (161,313.85).

(Signed) WRIGHT, CUMMINS & WRIGHT,
Solicitors for Complainant-.
NOURSE, KAUFFMAN & GURNSEY,
For such Defendants as They Have Appeared for in the Case.
BERRYHILL & HENRY,
For Defendants as Shown in the Records.

103 EXHIBIT No. 3.

STATE OF ILLINOIS, }
Cook County. }

In the Circuit Court, September Term, A. D. 1874.

JEREMIAH TERWILLIGER *et al.*
vs.
GREAT WESTERN TELEGRAPH COMPANY *et al.* } In Chancery. Supplemental Bill.

To the honorable judges of said court, in chancery sitting:

Your orators, J. M. W. Jones and John I. Bennett, of said Cook county; Anthony W. Street, of Council Bluffs, Iowa, and Alexander Street, of Nebraska City, Nebraska, who come in and make themselves parties to the above-entitled cause, on consent file this supplemental bill for themselves and all others like situated who desire to come in and be made parties hereto, humbly complaining, shew unto your honors that—

By order of court they have been permitted to come in and be made parties complainant in the above-entitled cause, and that they are stockholders of The Great Western Telegraph Company, one of the defendants. Your orators refer to the original bill filed in said cause and further state by way of supplement that subsequent to the filing of said original bill and under the directions of the supreme court of the State of Illinois under an appeal prosecuted therein said circuit court entered a decree herein on the 16th day of November, 1872, to which your orators refer and make the same a part of this bill.

That in pursuance *to* said decree a meeting of the stockholders of said telegraph company was held on the 28th day of January, 1873, at which meeting the following persons were elected directors of said company, to wit, Joshua Stark, Anthony W. Street, James E. Boyd, Charles N. Rix, R. B. Tracy, C. H. More, F. C. Farrell, Howard M. Holden, Abel H. Bliss, Jesse O. Norton, and John I. Bennett,
104 and the said stockholders repealed the by-laws theretofore in force and adopted a new set of by-laws, by which the directors of said corporation were prohibited from selling, transferring, or in

any manner disposing of the property of said corporation or any portion of the same or of leasing the same; that the stockholders at said meeting passed a resolution to the effect that the directors of said company might have power to execute a mortgage upon the property of the company for the purpose of paying any indebtedness then legally existing and for twenty-five thousand dollars ($25,000.00) in excess for the express purpose of extending the lines of said company from Springfield, Illinois, to St. Louis, Missouri.

That about the — day of February, 1874, at the annual meeting of the stockholders of said corporation, certain persons were elected directors of said company, and Joshua Stark was chosen president, O. D. Bond secretary, and Abel H. Bliss was appointed general superintendent; that your orator Anthony W. Street was one of the directors for the year ending February, 1874, and that your orators Alexander Street and John I. Bennett are now directors, but have no voice in the management of the affairs of the company for the reason hereinafter stated; that upon said election of said Stark as president, Bond as secretary, and the appointment of Bliss as general superintendent the said Stark and Bliss commenced to conspire together and with divers persons, whose names when discovered your orators pray leave to insert herein, to cheat and defraud the company out of its moneys, income, and property, and that said Stark, Bond, and Bliss and their conspirators matured a fraudulent scheme to issue bonds of said company in a large amount, to wit, for more than sixty thousand dollars ($60,000.00), and to secure the same upon the lines and all the property of said company by a trust deed containing strict clauses, whereby the same
105 might be foreclosed upon the alleged non-payment of any portion of the principal or interest of the said bonds and said company deprived of its property without an opportunity of defense; that said bonds or some of them upon some mere colorable but not real consideration should pass into the hands of the confederates of them, the said Bond, Stark, and Bliss, that a sale should be subsequently collusively made of all the property of said company under said trust deed, and the stockholders thus deprived of their property, and thus defeat the resolution of the stockholders forbidding the sale of the property of said company; that said Stark, Bond, and Bliss and their confederates, for the purpose of cheating and defrauding said company as aforesaid, on or about the — day of July, 1874, caused to be executed the bonds of the company as aforesaid for the aggregate sum of about sixty thousand dollars ($60,000.00), with — interest, payable — annually, and to secure said bonds executed a trust deed of said company, signed by said Stark as president and said Bond as secretary, upon the lines and other property of said company, appointing B. F. Allen as trustee to execute the alleged trust, which trust deed was recorded in the recorder's office at Milwaukee, Wisconsin, on the 30th day of July, 1874.

That said Allen is the treasurer of said company and is responsible and liable to account for said bonds; that said Stark, Bond, and Bliss have negotiated and received the money or other value upon

and for a large amount of said bonds and have appropriated the same to their own private uses and purposes: that the said Stark, Bond, and Bliss and their confederates, to carry out their said fraudulent schemes and to defraud and swindle said corporation, have caused the said Stark and Bond to be appointed upon the executive committee, together with other persons who would not attend
106 upon the meetings of said executive committee or who would confederate with them in their frauds; that none of the proceeds of the sale of said bonds or any portion of them have been used for the payment of the legal indebtedness of the said corporation existing at the time said resolutions were adopted by the said stockholders nor for the extension of the lines of said company as contemplated in said resolutions; that the accounts of the office of said company at Milwaukee show many and great irregularities, and the books of said office for many months show no returns or settlements; that said Stark, who resides at Milwaukee, has been in the habit of receiving the company's funds from said office and has appropriated the same to his own use, as your orators believe and charge; that said Stark has been acting in the double capacity of president and attorney for said company, and as such executive officer the greater part of his spare time is professed to be spent in the service and pay of said company, and the said Stark pretends to charge and is taking from the moneys of said company at the rate of ten dollars ($10.00) per day and pretended expenses for each and every day, and has thus taken and appropriated to his own use several thousand dollars of the company's moneys, for which he is accountable; that his services to the company are utterly worthless, and that he is, in the opinion of your orators, without executive ability, without tact, and your orators fear without integrity.

That the lines of said company are badly out of repair, and in many places the offices of the company have been seized on execution or attached for debt and are closed, and that the debt of the company is continually increasing, and that the said Bliss has appropriated large sums of money in pretended payments, but in fact overpayments of himself, &c., &c.; that it is to the interest
107 of the stockholders of the company that a receiver be appointed; that your orators are without remedy at the common law and ask relief in a court of chancery and ask a writ of summons be directed to said Joshua Stark, Abel H. Bliss, B. F. Allen, and Orville D. Bond, impleaded with the Great Western Telegraph Company, returnable according to law, and that an accounting be had between the said company and said defendants and each of them, and that a receiver be appointed to take charge of said company, &c., and for such other, further, and different relief as to your honors may seem meet.

(Signed) BENNETT, KRETSINGER & VEEDER,
Solicitors for Complainants.

Duly verified by John I. Bennett and J. M. W. Jones September 11th, 1874. Filed September 19th, 1874.

Indorsed on back as follows: Jeremiah Terwilliger *vs.* The Great Western Telegraph Company. Supplemental bill. Filed September 19th, 1874. Jacob Gross, clerk. Bennett, Kretsinger & Veeder, solicitors for complainants.

Certificate.

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains a full, true, and complete copy of the agreed statement of facts and Exhibit No. 3, attached thereto (all other exhibits being omitted), in a certain cause in said court, wherein Chas. Counselman *et al.* were complainants and Wm. H. Anderson *et al.* were defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and
108 affix the seal of said court, at office, in the city of Des Moines, in said district, this 4th day of February, 1890.

[SEAL.] E. R. MASON,
Clerk U. S. Circuit Court, Southern District of Iowa.

The nature and object of the foregoing suit of Counselman and others against Anderson and others will be fully explained herein a few pages later, where the record in said cause will be set out.

Deposition of John I. Bennett.

My name is John I. Bennett; residence, Chicago, Illinois; attorney-at-law and master in chancery of the United States circuit court of the northern district of Illinois; I was attorney-at-law and in the practice of my profession in the city of Chicago, in the State of Illinois, in the year 1874. As such attorney I prepared a supplemental pleading, or, more properly, an intervening and supplemental bill, as it was filed by parties other than those before the court in the original case and was in the nature of an intervening pleading. I did file such a pleading. I think J. M. W. Jones, John I. Bennett, Anthony W. Street, Alexander Street, and Monroe L. Hayward were complainants against Joshua Stark, Abel H. Bliss, B. F. Allen, and Orville D. Bond, impleaded with The Great Western Telegraph Company, were defendants. These were the parties to this intervening and supplemental bill. The only doubt I have is with reference to Monroe L. Hayward, as to whom my recollection fails me, but I have the impression that he was a party and that he was a resident of Bureau county, Illinois. I was one of the parties complainants to said supplemental bill. I am positive as to the filing — this pleading with the clerk of the circuit court of Cook county, in the State of Illinois. I have a distinct recollection of preparing it personally and of the proceedings which were had

upon it afterwards. I handed it to the said clerk for filing.
109 I cannot state the precise date upon which the pleading was filed. I understand the record shows the appointment of a receiver on the 7th day of October, 1874. My best recollection is that the intervening and supplemental pleading was filed by me within sixty days preceding the appointment of a receiver in that cause and at least twenty days before that date. Said supplemental bill was so filed in a certain cause, entitled in said court Jeremiah Terwilliger and Nelson Wheeler *et al. vs.* The Great Western Telegraph Company, David A. Gage, Josiah Snow, and Selah Reeve, defendants.

Cross-examination:

I cannot state whether the file-mark appears on the pleading or not, for it has been many years since I have examined the files in that case. The circumstances which impress themselves upon my memory so that I know I must have filed it within the period which I have stated in my direct examination are that at the annual meeting of the stockholders of the Great Western Telegraph Company in the early part of 1874 a resolution was passed by the stockholders authorizing the board of directors or their officers to issue a series of bonds to be secured by a mortgage upon the property of the telegraph company, and which I understood and the stockholders understood were to be solely used in retiring and satisfying the debts of the company. As the intervenors in this intervening supplemental bill were advised and understood, these bonds had been executed by the officers of the company and were being used for purposes other than those which the intervenors, the stockholders, understood they were to be used for. These intervenors, therefore, filed this intervening and supplemental bill on behalf of themselves and all others like situate, setting up especially this matter and alleging, among other things, that the officers of the company were wrongfully disposing of these bonds, and praying
110 an order to prevent further mischief on the part of the officers of the company, the appointment of a receiver, together with other relief.

Joshua Stark, the president of the company, lives at Milwaukee, Wisconsin, and was, together with other officers of the company, personally made defendant to this intervening pleading. I have a distinct recollection of pressing the intervening pleading after it was filed, but Mr. Stark being a non-resident had to be served with a copy of the intervening pleading or otherwise brought into the case, and as I recollect it the other officers of the company had to be served also. Mr. Stark came down personally after the intervening pleading was filed and contested the matter in person. He was a lawyer. I recollect distinctly the hearing that was had before the court, and from all these circumstances I make the estimate that not to exceed sixty days could have elapsed from the time of the filing of the petition to the time of the decree appointing a receiver. I have already said, in my direct examination, that I do not know

exactly when it was filed. I have no recollection of Hiram Purdy being a party to said intervening supplemental bill, neither have I any recollection of his name appearing in answer to that supplemental pleading. I do not remember of ever having known Mr. Purdy.

Duly Certified Copy of the Original Agreement for the Appointment of a Receiver Filed in the Office of the Clerk of the Circuit Court of Cook County, Illinois, October 7th, 1884.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Cook Circuit Court, October Term, 1874.

JEREMIAH TERWILLIGER *et al.*
vs.
THE GREAT WESTERN TELEGRAPH COMPANY *et al.*
In Chancery.
Supplemental Bill.

It is mutually agreed by the parties to the supplemental bill in the above cause filed as follows:

111 1st. A receiver shall be appointed in the above cause by the court. The person appointed shall be satisfactory to the court.

2d. At the same time of the appointment of a receiver the court shall enter an order in said cause to the effect that—

First. That said cause be referred to some master in chancery, &c.

Second. That all accountings prayed for in said supplemental bill be had before said same master, in the same period, and reported at the same time, and the reference now pending shall also be closed and a report made to the court.

6th. Said order shall direct that the duties of said receivership be closed and discharged within sixty days from the date of the order, subject, however, to extension of time in case the court shall deem it to be in furtherance of justice.

Chicago, October 5, 1874.

JOHN CLARK HILTON,
By E. A. SMALL, *His Attorney.*
THOS. J. SUTHERLAND,
Solicitor for Selah Reeve.
SLEEPER & WHITON,
Solicitors of Commercial National Bank.
BENNETT, KRETSINGER & VEEDER,
Solicitors for said Complainants.
HARDING, McCOY & PRATT,
Solicitors for Great Western Telegraph Company.

Indorsed on back as follows: Filed October 7, 1874. Jacob Gross, clerk.

112 *Certificate.*

Duly certified by Henry Best, clerk of the circuit court of Cook county, Illinois, to be a true, perfect, and complete copy of the original agreement, filed on the 7th day of October, 1874, in his office, in a certain cause then pending in chancery, between Jeremiah Terwilliger *et al.*, complainants, and The Great Western Telegraph Company *et al.*, defendants. Duly signed and dated by Henry Best, clerk, November 18, 1889, with seal of said court affixed.

Said certificate duly attested November 18, 1889, by the Hon. M. F. Tuley, chief justice of the circuit court of Cook county, Illinois.

Duly Certified Copy of the Original Order Made by Erastus S. Williams, Judge of the Circuit Court of Cook County, Illinois, Appointing a Receiver, of Date October 7, 1874.

STATE OF ILLINOIS, } ss:
Cook County, }

Cook Circuit Court, October Term, 1874.

JEREMIAH TERWILLIGER
vs.
THE GREAT WESTERN TELEGRAPH COMPANY. } In Chancery. Supplemental Bill.

And now, at this date, come the parties to the above-entitled cause—the said complainants in said supplemental bill, by Bennett, Kretsinger and Veeder, their solicitors; and said defendants The Great Western Telegraph Company and Joshua Stark, by Harding, McCoy & Pratt and John I. Bennett, their solicitors; and said defendant The Commercial National Bank, by Sleeper & Whiton, its solicitor-; and said defendant John Clark Hilton, by Edward A. Small, his solicitor; and the said defendant Selah Reeve, by Thomas J. Sutherland, his solicitor; and the said cause coming on to be heard before his honor Erastus S. Williams upon the motion of said complainants in said supplemental bill for the appointment of a receiver herein of and for said corporation; and it ap-
113 pearing to the court that due notice has been given of the pendency of said motion to all persons who are parties to said suit, and that they are here present, either by counsel or in person, and that all of said parties have agreed and assented to the following order:

It is therefore ordered, adjudged, and decreed by the court that O. H. Horton be, and is hereby, appointed receiver of the Great Western Telegraph Company and all of its property and effects of every kind whatsoever, &c.

Dated Chicago, October 5th, 1874.

Endorsed: Enter October 7th, 1874.

ERASTUS S. WILLIAMS, *Judge.*

Certificate.

Duly certified by Henry Best, clerk of the circuit court of Cook county, Illinois, to be a true, perfect, and complete copy of a certain order endorsed by Erastus S. Williams, then judge of said court, to be entered of record on the 7th day of October, 1874, in a certain cause then pending in said court in chancery between Jeremiah Terwilliger, complainant, and The Great Western Telegraph Company *et al.*, defendants; duly signed at Chicago, Illinois, November 18th, 1889, by Henry Best, clerk, with the seal of the court affixed.

Said certificate duly attested on November 18th, 1889, by the Hon. M. F. Tuley, chief justice of the circuit court of Cook county, State of Illinois.

Certificate of Henry Best, clerk of the circuit court of Cook county, State of Illinois, as to the date of the filing of the bill of Almon Kidder *vs.* The Great Western Telegraph Company. Chancery. No. 13551.

I, Henry Best, clerk of the circuit court of Cook county, Ill., and the keeper of the records and files thereof, do hereby certify
114 that the original bill of complaint in the case of Almon Kidder against The Great Western Telegraph Company, No. 13551, chancery, was duly filed in this office on the 12th day of October, 1874, as the same appears upon the records in my office, to wit, in clerk's general docket No. 4.

In witness whereof I have set my hand and affixed the seal of said court, at the city of Chicago, in said county, this 3d day of January, 1890.

[SEAL.] HENRY BEST, *Clerk.*

Said certificate was duly attested January 3d, 1890, by the Hon. F. M. Tuley, chief justice of said court.

Duly certified copy of decree of date October 13, 1874, appointing a receiver for the Great Western Telegraph Company in said cause of Almon Kidder.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Pleas before the honorable the judges of the circuit court of Cook county, State of Illinois, held in Chicago, in said county and State, the 21st day of September, 1874, &c.

E. S. WILLIAMS,
HENRY BOOTH,
JNO. G. ROGERS,
LAMBERT TREE,
Judges.

ALMON KIDDER
vs.
THE GREAT WESTERN TELEGRAPH COMPANY. } No. 12551. Creditor's Bill.

Upon reading the bill of complaint in this cause praying, among other things, for the appointment of a receiver of all the property and assets of the defendant, and on motion of Harding, McCoy and Pratt and J. W. Matthew, solicitors for complainant, the defendant, by its solicitor, appearing and consenting thereto in open court—

It is ordered, and the court doth hereby order, that O. H.
115 Horton, an attorney of this court, be, and is hereby, appointed receiver of all the property, real, personal, and mixed, wherever the same may be found, belonging to the defendant, &c.

Certificate.

Duly certified by Henry Best, clerk of the circuit court of Cook county, Illinois, to be a true and complete copy of a certain order made and entered of record on the 13th day of October, 1874, in a cause then pending in said court in chancery between Almon Kidder, complainant, and The Great Western Telegraph Company, defendant.

Duly signed by Henry Best, clerk, at Chicago, in said county, November 18, 1889, with the seal of said court affixed.

Said certificate duly attested November 18, 1889, by the Hon. M. F. Tuley, chief justice of said court.

Duly certified copy of the original bill, answers, replications, and final decree in the case of Charles Counselman, John J. McClellan, and E. R. Bowen, receiver of the Great Western Telegraph Company, *vs.* W. H. Anderson, E. C. Bosbyschell, and others, No. 1957, equity, in the circuit court of the United States for the southern district of Iowa, central division, removed from the circuit court of the State of Iowa in and for Polk county.

CHARLES COUNSELMAN, JOHN J. MCCLELLAN, and E. R. Bowen, Receiver of the Great Western Telegraph Company,
vs.
W. H. ANDERSON, E. C. BOSBYSCHELL, H. Purdy, A. Delahaye, John W. Gilbert, Thomas Hedge, and 155 Other Defendants, Citizens of the State of Iowa. } In the Circuit Court of Iowa in and for the County of Polk, September Term, 1882.

1st. Plaintiffs state that they are citizens of the State of Illinois' and that the defendants are citizens of the State of Iowa.

2d. That on or about the 2d day of December, 1867, the said Great Western Telegraph Company was incorporated under and by
116 virtue of the laws of the State of Illinois, &c., and carried on its business until about the 19th day of October, 1874. A

copy of the charter of said corporation is hereto attached, marked Exhibit A, and made part of this petition.

3d. The capital stock of said corporation was fixed at the sum of three million dollars ($3,000,000), divided into shares of the par value of twenty-five dollars ($25) each.

4th. That on or about the said 19th day of October, 1874, the said Great Western Telegraph Company became and has ever since continued to be insolvent, and for a long time has been and now is without any assets, means, or property with which to pay its debts, except the sums due to it for unpaid subscriptions to its capital stock as hereinafter set forth.

5th. That since said 19th day of October, 1874, said company has wholly ceased to do or carry on its business and has ever since failed and neglected to hold meetings, elect officers or directors, or in any manner use or exercise the franchise conferred by said charter and incorporation.

6th. That on or about the 7th day of October, 1874, one Almon Kidder brought his suit in the circuit court of Cook county, State of Illinois, against the Great Western Telegraph Company, in which suit the said corporation was duly and personally served with notice, and by its attorney appeared in said action, and such proceedings were had thereon that on or about the 9th day of October, 1874, Oliver H. Horton was by order of the court appointed receiver of said corporation and its assets and effects, conferring upon him, the said receiver, all the powers and duties usually granted and imposed upon receivers in such cases, which order has ever since been and is now in full force and effect; that after-
117 wards the said Horton resigned and one Thomas S. McClellan was appointed receiver, and before the commencement of this suit the said McClellan resigned, and the plaintiff, the said E. R. Bowen, was appointed by said court receiver of said corporation, with same powers and rights conferred upon the said Horton.

7th. Said receiver took possession of all the property, assets, and effects of said corporation and converted the same into money and has distributed the same, under the orders of said court, and he now has no money or property with which to pay the remainder of the liabilities of said company.

8th. That each of said defendants is a stockholder or subscriber to the capital stock of the said Great Western Telegraph Company, and that no one of them ever paid the said company or any one in its behalf more than forty per cent. of the par value of the shares of stock so subscribed or held by him, and the greater part of said defendants have paid but ten per cent.

9th. That at the time each of said defendants subscribed to the capital stock of said corporation he executed and delivered to said corporation an agreement in writing, whereby they and each of them agreed to take a certain number of the shares of such capital stock and pay for the same five per cent. at the time of such subscription and the remainder as the directors of said corporation might from time to time order.

10th. That the several agreements so executed and delivered by

said defendants are similar in all respects except as to the name, residence, date of subscription, and number of shares, all of which is shown by Exhibit B and Exhibit C, hereto attached and made part of this petition, showing the names of the defendants, places of residence, dates of subscription, number of shares, &c.

11th. That each of said defendants thus became and now is
118 a stockholder of said corporation, and that the provisions contained in said subscription agreement, whereby it was agreed upon the payment of forty per cent. of the par value of such shares full-paid stock should be issued by said company to said defendants, is fraudulent, void, and of no effect; that each of said defendants is now indebted to said corporation for the use of the plaintiff Charles Counselman to the amount unpaid upon said stock subscriptions as shown by Exhibit C.

12th. That on or about the 5th day of June, 1872, said company being then engaged in carrying on its business, the board of directors of said corporation, duly elected and qualified in pursuance of the power conferred in and by said charter and in pursuance of the contract of subscription heretofore referred to, ordered and directed that each of said defendants, as such stockholders, pay to said corporation on or before the 12th day of July, 1872, all unpaid balances due to said corporation, as provided by the terms of said contract of subscription and as shown by the statement Exhibit C. A copy of the order so entered on record on the books of said corporation is hereto attached, marked Exhibit D.

13th. That on or before the 17th day of April, 1880, the said Great Western Telegraph Company was justly indebted to Joshua Stark and Winfield Smith in the sum of six thousand seven hundred and forty-seven dollars and twenty cents ($6,647.20), and that judgment therefor has been rendered in the circuit court of Cook county, Illinois, against said corporation for said sum, to wit, on the 17th day of April, 1880, and that said judgment is still unsatisfied.

14th. That on or about the 21st day of October, 1880, the said Stark and Smith sold, assigned, and transferred to plaintiff Charles Counselman all their right, title and interest to said judgment.

119 15th. That it is impossible for the plaintiff to obtain a judgment at law against said company in the State of Iowa, for that it having ceased to do and carry on business or elect officers or directors and it has not had nor has it now an asset in said State upon whom service of process could be made; that on or about the 1st day of September, 1880, there was allowed in said proceeding against said company in the circuit court of Cook county, Illinois, a claim for the sum of one thousand four hundred and fifty dollars ($1,450) in favor of John I. Bennett against the said company, which claim has been assigned to the plaintiff J. J. McClellan, and said claim remains wholly unsatisfied.

18th. That the plaintiffs bring this suit in their behalf and in behalf of all other creditors of the Great Western Telegraph Com-

pany who may make themselves parties hereto; that a portion of said defendants are residents of the county of Polk, State of Iowa.

Wherefore plaintiffs pray that said defendants may come to a fair and just account, and that they severally may be decreed to pay to plaintiffs such amount or amounts, not exceeding the amount of unpaid stock due from each of them, as may be necessary to pay the sum so due to said plaintiffs from the Great Western Telegraph Company and such other sums as may be due to other creditors who shall make themselves parties hereto, with interest and costs; and plaintiffs pray for such other and further relief as may be agreeable *in* equity and good conscience.

WRIGHT, CUMMINS & WRIGHT,
For Plaintiffs.

Duly verified by John J. McClellan August 11, 1882.

Exhibits Referred to in said Petition.

Exhibit "A," articles of incorporation of the Great Western Telegraph Company, the same as found on pages 26 to 30, inclusive, appellant's abstract.

120 Exhibit "B," contract of subscription, the same as found on pages 5 and 6, appellant's abstract.

Exhibit "C," showing the name, residence, date of subscription, and number of shares subscribed for by the several defendants and amount paid thereon, including the name of Hiram Purdy, February 16th, 1869, fifty shares; amount paid, two hundred and seventy-five dollars.

EXHIBIT "D."

Resolved, That it is ordered that all unpaid balances by subscribers for shares of the capital stock of the Great Western Telegraph Company are hereby declared due and payable at the office of the company in Chicago on the 12th of July next, and that the secretary notify the subscribers of this order and demand payment.

Resolved, That the president or treasurer is hereby authorized to collect by legal means any and all balances due from subscribers to the capital stock of said company on or after the 12th day of July next.

Resolved, That after the 12th day of July next any subscriber may pay the balance due and unpaid upon any subscription and receive a certificate for such stock upon the filing with the secretary or treasurer a satisfactory bond indemnifying the company against loss by reason of any claims for such stock by the original subscriber or his legal representative.

Exhibit "E" contains a series of interrogatories propounded to the several defendants to be answered by them. Indorsed on back as follows: Filed August 15th, 1882. P. D. Anthony, clerk. Copy fee, ten dollars. Filing, one dollar and fifty cents. Paid by W. C. & W.

Petition for Removal to United States Circuit Court for the Southern District of Iowa, Central Division.

On the 5th day of September, 1882, said cause was duly
121 removed to the circuit court of the United States for the southern district of Iowa, central division, on petition and bond duly filed in the circuit court of Polk county, Iowa, and by order of said court to that effect.

The order of removal was made by the circuit court of Polk county, Iowa, September 23, 1882.

Amendment to Bill of Complaint.

Your orators, by leave of court, amend their bill of complaint and thereupon aver that after the organization of the said Great Western Telegraph Company, to wit, on or about the 25th day of March, 1868, said Selah Reeve *who* appeared to be by the articles of incorporation a subscriber for 117,897 shares of the capital stock of said company in a contract with said company, by the terms of which said Selah Reeve agreed to construct two thousand miles of telegraph line for said company, and said company agreed on its part to pay said Reeve thereafter in 120,000 shares of its capital stock and to issue to him proper certificates therefor, said shares being the shares already subscribed for by him, the said Selah Reeve; and thereafter, about the same time, the said Selah Reeve assigned to one Josiah Snow the 117,897 shares of stock already subscribed for by him in trust to sell the same to such persons as either he or the company could procure to subscribe to the stock of said company at ten dollars ($10) per share, the proceeds thereof to be paid over to the said Reeve upon said contract as fast as he should earn the same, and on or about the 26th day of March, 1868, said Reeve executed to said Snow irrevocable authority to sell said stock.

Your orators further show that thereafter, in pursuance *to* said arrangement, the several contracts of subscription were taken from the several defendants herein.

122 Your orators further show that thereafter one Jeremiah Terwilliger, who had subscribed for stock of said company at the same time and under the same conditions, brought a suit in the circuit court of Cook county, Illinois, against the said Great Western Telegraph Company, Selah Reeve, and others, in which it was judicially determined that the contracts of said Reeve with the company were fraudulent; that his subscription to the capital stock of said company was a sham and void, &c.

(Signed) WRIGHT, CUMMINS & WRIGHT,
For Complainants.

Indorsed on back thereof as follows: In U. S. circuit court, central division, southern district of Iowa. Counselman *vs.* Anderson. Amendment to bill. Filed June 1, 1883. E. R. Mason, clerk.

Answer of Defendants Herein, Including A Delahaye, Thomas Hedge, Hiram Purdy, E. D. Rand, O. H. Schenck, C. E. Starr, and Others.

1st. Admit that plaintiffs are citizens of the State of Illinois and that defendants are citizens of the State of Iowa.

That the Great Western Telegraph Company was incorporated under and by virtue of the laws of the State of Illinois on the 2nd day of December, 1867; admit that the capital stock of said corporation, as stated by its charter, is $3,000,000.00, divided into shares of twenty-five dollars ($25.00) each; admit the appointment of a receiver, and that the defendants signed certain subscription contracts purporting to be for stock in the said corporation company for the number of shares and in the amount as set forth in the statement hereto attached marked Exhibit "A."

123 But these defendants deny that said subscription for stock was valid, or that by reason thereof these defendants became stockholders in said company for the reasons hereafter appearing in this answer.

3rd. Further answering, these defendants aver that by the laws of the State of Illinois it was requisite before the said corporation engaged in any business whatever or became authorized to act in the corporate capacity that its capital stock of $3,000,000.00 should be subscribed for in full, and that in fact the said three million dollars of the capital stock of the said Great Western Telegraph Company was subscribed in full on or prior to the 2nd day of December, 1867, and that the subsequent pretended contracts of subscription executed by these defendants were absolutely void and of no effect, and that these defendants are in no way liable therefor.

5th. The defendants aver that this suit is barred by the statute of limitations; that more than five years have elapsed since the alleged right of action accrued.

6th. These defendants aver that it is provided by the statute of the State of Iowa that suits on written contracts shall be begun within ten years from the time said action thereon accrued, and that more that ten years have passed since the right of action accrued to said corporation, if any ever did accrue thereto.

(Signed) NOURSE & KAUFFMAN,
Solicitors for Certain Defendants.
WINSLOW & WILSON,
PHILLIPS & DAY,
BERRYHILL & HENRY,
THOMAS HEDGE,
Solicitors for Other Defendants.

Duly verified by D. L. Clark December 23d, 1884.

Indorsed on back as follows:

124 United States circuit court, southern district of Iowa, central division. Counselman and others against Anderson and others. Answer. Filed December 31, 1884. E. R. Mason, clerk.

(Replication by complainants in usual form denying allegations of answer.)

Final Decree.

United States Circuit Court, Southern District of Iowa, Central Division, October Term, A. D. 1885.

WEDNESDAY, *October* 28, 1885.

CHARLES COUNSELMAN *et al.*
vs.
WM. H. ANDERSON *et al.* } No. 1957. Equity.

This cause coming on for final hearing, parties appearing by counsel, and the court, having heard the evidence and arguments of counsel, orders, adjudges, and decrees that the complainants do have and recover of and from the following-named defendants the amount set opposite their respective names, to wit:

William Vaughn	$587 50
Fred. Vaughn	587 50
Charles H. Spencer	980 00
D. Winter	55 00
J. B. Grinnell	475 00
S. G. Smith	475 00
D. F. Eicher	475 00
John Hawthorne	62 00
W. C. James	475 00
Ben. Winchester	187 50
Burnham & Jaggar	85 00
W. W. McKnight	237 50
John Meyer	80 50
Adam Scharff	108 00
J. B. Eyerly	170 00
Wm. F. Manning	150 00
M. K. Tidrick	237 50
M. A. Blanchard	90 00
J. W. Gilbert	125 00
Winslow & Wilson	27 50
S. H. Herrick	587 50

and that execution issue therefor.

125 It is further ordered that the defendants against whom judgments are rendered in excess of five hundred dollars ($500) pay one-third of the costs and complainants the remainder. The bill is dismissed against all the defendants except those above named.

(Signed) DAVID J. BREWER,
Circuit Judge.

Motion by defendants against whom judgment was rendered to set aside said judgment and for new trial is overruled.

Certificate.

United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of the petition in equity, Exhibits "A, B, C, D, and E" thereto, petition for removal, bond for removal, and order of removal as contained in the transcript of record from the circuit court of Polk county, Iowa, and also the following pleadings and proceedings in this court, to wit: Demurrer of D. Finch *et al.*, amendment to bill, answer of S. G. Smith *et al.*, replication to answer, amendment to answer — M. A. Blanchard *et al.*, answer to interrogatories by Thomas Hedge, Jr., Hiram Purdy, J. W. Gilbert, A. Delahaye, C. E. Starr, F. B. Jagger, E. D. Rand, and O. H. Schenck, final decree and motion of D. Winter and Burnham & Jagger to set aside decree as to them in a certain cause adjudicated in said court wherein Charles Counselman *et al.* were complainants and W. H. Anderson *et al.* were defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

126 In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Des Moines, in said district, this 15th day of November, 1889.

[SEAL.] E. R. MASON,
Clerk U. S. Circuit Court, Southern Dist. of Iowa.

Resolutions.

Defendant introduced in evidence the following resolutions passed by the executive committee of the Great Western Telegraph Company at a meeting held by the said committee at the office of the company in the city of Chicago, State of Illinois, on the 5th day of June, 1872, as found upon page 71 of the record book of said company, to wit:

Special attention was called to the point of making a final call on all the subscribers who took stock, and, after some discussion, the following resolutions were moved, seconded, and carried:

Resolved, That it is ordered that all balances unpaid by subscribers for shares of the capital stock of the Great Western Telegraph Company are hereby declared due and payable at the office of the company, at Chicago, on the 12th day of July next, and that the secretary notify the subscribers of this order and demand payment.

Resolved, That the president or treasurer is hereby authorized to collect by legal means any and all balances due from subscribers to the capital stock of the Great Western Telegraph Company and unpaid after the 12th day of July next.

Resolved, That after the 12th day of July next any subscriber may pay the balance due and unpaid upon any subscription and re-

ceive a certificate for such stock upon filing with the secre-
127 tary or treasurer a satisfactory bond indemnifying the company against loss by reason of any claim for such stock by the original subscriber therefor or his legal representative June 5, 1872.

(Signed) D. A. GAGE, *President.*

Proceedings had and passed at a meeting of the stockholders of the Great Western Telegraph Company held in the city of Chicago, in the State of Illinois, on the 28th, 29th, and 30th days of January, 1873, as found on pages 7 to 9, inclusive, and on pages 22 to 23 of the record book of said company, to wit:

On motion, voted that the president and secretary be requested to issue stock to such as apply for it, the same to be issued in accordance with the decision of Judge Williams.

On motion, voted that the treasurer be requested to make a general report to this meeting to-morrow morning.

Adjourned to 10 o'clock to-morrow morning.

JANUARY 29, 1873—10 a. m.

Meeting met according to adjournment. Minutes of last meeting read and approved.

The committee on by-laws presented their report, and the vote was taken on each article separately. Amendments were made to articles 2, 3, 4, 5, and 6, when the report was accepted and adopted.

On motion, voted that the special business of the meeting on reassembling this afternoon shall be the election of directors.

Adjourned to 2 o'clock p. m.

On the reassembling of the meeting at 2 o'clock p. m. Joshua Stark presented the following resolutions, which were adopted:

Resolved, That a vote by ballot be had upon the adoption of the by-laws reported to this meeting this morning and adopted
128 by the *viva voce* vote of the meeting, and that all the shareholders voting be requested at the same time they offer their votes for directors to offer their votes either against or for the new by-laws, and that the inspectors who shall be appointed for the election of directors shall also receive, canvass, and report the votes cast upon the resolution.

O. D. Bond, C. H. Moore, and Joshua Stark were appointed inspectors of election.

The following nominations for directors were made: James Clark, D. P. Stubbs, T. H. Beebe, C. N. Rix, A. H. Bliss, C. H. McCormick, R. B. Frary, F. M. Mills, J. J. Easter, C. H. Moore, A. W. Street, J. R. Rutler, J. J. Bennett, Howard N. Holden, J. O. Norton, D. C. Farrell, J. E. Boyd, and S. H. Calhoun.

On motion of Judge Doolittle, voted that when the inspectors make their return to the chairman of the result of the election of directors then the chairman shall declare this meeting adjourned *sine die.*

At 5.30 o'clock p. m. the polls were declared closed and the inspectors given until 10 o'clock to-morrow morning to canvass the votes.

JANUARY 30TH, 1873—10 a. m.

The inspectors announced the following-named gentlemen elected directors of the Great Western Telegraph Company: A. H. Bliss, John I. Bennett, Joshua Stark, C. H. Moore, R. B. Frary, D. C. Farrell, Anthony W. Street, James E. Boyd, C. N. Rix, Howard N. Holden, and Jesse O. Norton.

The chairman declared such persons duly elected directors. The by-laws which had been adopted on the day previous by the *viva voce* vote were adopted unanimously.

Adjourned.

R. F. STEELE, *Secretary.*

129 *Report of Inspectors of Election of Directors to the Stockholders at Their Meeting, January* 30, 1873.

To Honorable Jesse W. Fell, chairman, &c.:

The inspectors appointed to conduct the election for directors of the Great Western Telegraph Company, called to be held by order of the court, have performed that duty and carefully canvassed the votes offered by the shareholders at such election, and beg leave to submit the following as the result of the election:

The whole number of votes given was 19,241½. The following persons received respectively the number of votes for the office of directors of said company in figures opposite their name, to wit: (Here follows the name of each party voted for, with the number of votes received, the names above mentioned being the directors receiving a majority of votes at such election.)

17,773 votes were given for the adoption of the new by-laws, under the resolution of the 29th inst., and no votes were given against their adoption.

Chicago, January 30, 1873.

O. D. BOND,
C. H. MOORE,
JOSHUA STARK,
Inspectors of Election.

Officer's Return of Service on the Original Notice Issued in This Cause.

STATE OF IOWA, }
Des Moines County. }

Received the within notice August 30, 1888, and I hereby certify that I served the same personally on the 30th day of August, 1888, by reading the same to the within-named Hiram Purdy personally and by delivering to him personally a copy thereof at his usual place of business in Burlington township, Des Moines county, Iowa.

N. FULLERTON,
Sheriff Des Moines County, Iowa.
By W. J. CUNNINGHAM, *Deputy.*

130 The original petition herein is indorsed on back as follows: Des Moines county, Iowa. Filed August 30, 1888. W. D. Inghram, clerk.

Act of the General Assembly of the State of Illinois approved April 18, 1872, as found on pages 296 to 307, inclusive, of the volume of Public Laws of Illinois for 1871 and 1872, published by authority of said State. Said act took effect July 1, 1872; also pages 286 and 287 Revised Statutes of the State of Illinois, 1887, Herd. Section 25, heretofore set out in defendants' answer, is included in said act (appellee's additional abstract, page —).

D. P. STUBBS recalled for defendants: I was a party plaintiff to the original suit of Terwilliger and others against the Great Western Telegraph Company *et al.* in the circuit court of Cook county, State of Illinois, commenced in November, 1869. Myself and Mr. Purdy, the defendant herein, were parties complainant to the said Terwilliger bill. Mr. Purdy, myself, and others asked to be made parties to the Terwilliger petition in such cause, and this was done. We became parties, I think, prior to the first day of April, 1870. My name did not appear in the Terwilliger suit as an attorney. Mr. Van Buren managed the case there and I looked after matters here in Iowa, Fairfield, Mt. Pleasant, and Burlington. I recollect that this Terwilliger case went to the supreme court of the State of Illinois and back again to the circuit court of Cook county, Illinois. The decree in that case was rendered by the said circuit court in pursuance to the decision of the supreme court November 16, 1872. I recollect the circumstance. I was not in the court at the time, but I was there the January following when the decree was talked over. Mr. Van Buren and other attorneys and myself repaired to a meeting of the directors
131 of the company held at that time. A meeting of the stockholders was held at that time; some time in January, 1873. The weather was very cold. I took the receipt of Mr. Purdy given him by the Great Western Telegraph Company for money he had paid, and, after the directors at that meeting had directed the secretary to issue the stock in accordance with the decree, I laid down the receipts of Mr. Purdy on the table, and my recollection is that Mr. Purdy had paid two hundred and seventy-five dollars ($275.00) and the secretary issued the twenty-seven and one-half shares of stock of the Great Western Telegraph Company for Mr. Purdy, and I receipted for them. I took the certificate home with me and kept it, as heretofore said in my evidence. This occurred on the 29th day of January, 1873.

Cross-examination:

I think the certificate was signed by the secretary and David A. Gage, president of the company. That is my recollection.

Redirect examination:

The meeting I attended at that time was a meeting of the stock-

holders of the Great Western Telegraph Company, called in pursuance to a decree entered in the Terwilliger case. The meeting was composed of the former president and former secretary and officers or stockholders who had certificates of stock or had stock receipts for money paid on stock.

Int. 4. What was the object of the meeting? What was said and done with reference to the issuing of stock for money paid?

(Objected to — incompetent, irrelevant, and immaterial. Objections sustained. Defendant excepts.)

The defendant proposes to prove by this witness that the meeting of the stockholders to which he refers was held by the persons who had actually paid money on their subscriptions to the stock, and that the meeting was held in pursuance to a decree of the
132 court in the Terwilliger case, and that stock was there issued to persons who had paid money under such decree, and that this was the object of the meeting, and that it was stated, discussed, and agreed there that such stock under said decree should be issued to such persons as had paid money as full paid-up stock and was so assented to and agreed upon by the meeting then in session.

(Objected to by plaintiff. Objections sustained. Defendant excepts.)

HIRAM PURDY, witness: The name of the person who called upon me in February, 1869, and requested me to subscribe to the capital stock of said Great Western Telegraph Company was Snow. He represented himself to me at that time as acting as agent of the telegraph company. He asked me to subscribe for the stock of the Great Western Telegraph Company. I made my subscription at the time, relying upon what he said to me at the time, supposing he was the agent of the Great Western Telegraph Company and supposing the company owned the stock and had it for sale. I had no knowledge at that time of a man named Selah Reeve. I paid two hundred and seventy-five dollars ($275) on my subscription. The last I paid was in the latter part of 1869. I got a receipt for the money I paid in. I handed this receipt to Mr. Stubbs afterwards. I was a party complainant to the original Terwilliger suit. I became a party complainant in the spring of 1870. I had paid the whole of the two hundred and seventy-five dollars ($275) prior to that time. I never had any knowledge or received any notice of the filing of the supplemental bill in the Terwilliger case in the fall of or in September, 1874. I never receive- any notice and had no individual knowledge of the filing of that bill. I was never a party to that supplemental bill and never appeared therein or authorized any one to appear for me. I never appeared in or authorized
133 any one to appear for me in any proceeding with reference to the appointment of a receiver or of making an assessment or in anything connected with that cause. There was never any notice served upon me of the bill for the appointment of a receiver or for the making of the assessment against the stockholders of the Great Western Telegraph Company in that Terwilliger case or in any other. I had no knowledge of any such proceeding and never

appeared therein or authorized any one to appear for me. The first knowledge I had of any claim made against me was in the suit in the Federal court in Iowa, at Des Moines, where I was made a party defendant to that suit.

Cross-examination:

Mr. Stubbs and Mr. Van Buren came to my store, and I employed him and Stubbs to attend to the matter in Illinois. It was a long time ago, and I gave Stubbs my papers and employed them to attend to the matter for me. Mr. Van Buren was my counsel, not Mr. Stubbs, in the case. I do not know whether Mr. Van Buren had any notice or not; I know nothing at all about it.

Evidence in Rebuttal.

THOMAS J. SUTHERLAND, witness: The original contract between the Great Western Telegraph Company, David A. Gage, and Josiah Snow, to wit, October 26, 1868, was signed by David A. Gage, as president of the company, and by Selah Reeve and Josiah Snow; that original contract was in the possession of the Great Western Telegraph Company at the time of the appointment of a receiver, and was in the receiver's possession some time after. Since suits have been brought against the stockholders I looked through the papers in the Terwilliger case for this contract, but it could not be found. I hold in my hand a copy of that original contract and now offer it in evidence.

134 Cross-examination:

I wrote the copy of the contract before the master in chancery from a book; this was written by me out of a book before a master in chancery, or taken down by a short-hand reporter from the book; this copy was made from a copy.

(Objected to by defendant as incompetent, irrelevant, and immaterial. Objection overruled and defendant excepts.)

S. L. GLASGOW,
Attorney for Appellee.

135 & 136 And said cause was duly submitted to said supreme court on the foregoing record on the 20th day of Jan., 1891, and on the 15th day of Oct., 1891, said court filed its decision in writing, the same being in the words and figures following, to wit:

137 In the Supreme Court of Iowa, October 15th, 1891.

THE GREAT WESTERN TELEGRAPH COMPANY, for Use of ELIAS R. BOWEN, Receiver, Appellant,
vs.
HIRAM PURDY.
} Appeal from Des Moines District Court.

Hon. Chas. H. Phelps, judge.

Action by the receiver of a corporation to recover against a stockholder an unpaid balance due upon his subscription for stock. The case was tried without a jury and judgment rendered for defendant. Plaintiff appeals.

Newman & Blake, Thomas J. Sutherland, for appellant; S. L. Glasgow, for appellee.

138 BECK, *C. J.:*

I. On the 16th day of February, 1869, defendant subscribed for fifty shares of the capital stock of the Great Western Telegraph Company, organized under the laws of the State of Illinois in May, 1868. The par value of each share of stock was $25. Payments of installments were made upon the stock. In 1874 a receiver of the Telegraph Co. was appointed. In 1886 a decree was entered in an action in the circuit court of Cook county, Illinois, ordering an assessment upon the stockholders for the unpaid stock subscriptions. The corporation was a defendant, and certain persons who need not be named were plaintiffs.

It does not appear that defendant was a party to the proceedings. This action was commenced in 1889. The contract of subscription is in the following language:

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock
139 of the Great Western Telegraph Company placed opposite our respective names and pay for the same in installments, to wit: 5 per cent. on amount paid in, and the balance as the directors from time to time may order. In consideration thereof the Great Western Telegraph Company agree that when forty per cent. of the par value of the shares shall have been paid under such orders and the installment receipts therefor surrendered to the company the number of shares severally subscribed by the undersigned shall be issued to them as full-paid stock by the said company.

T. C. Snow is appointed agent to solicit stock and receive only the first installment of five per cent. (fifty cents on a share) at the time of subscription.

J. SNOW, *Secretary.*

Names.	Residence.	Date of subscription.	No. of shares.
Hiram Purdy.	Burlington, Iowa.	Feb. 16, 1869.	Fifty (50)."

In 1872 the executive committee of the board of directors of the telegraph company by resolution required the payment of
140 all arrearages upon subscription to the capital stock of the company and directed the secretary to notify the stockholders of this action and to demand payment of all arrearages. It is not made to appear that the notices required were given to the stockholders.

II. The defendant pleads as a defense that the action is barred by the statute of limitations. In our opinion this defense is sustained and the action must fall.

It will be observed that five per centum of the amount of the stock was payable when the subscription was made, and the balance was to be paid as the directors of the corporation should order.

It may be assumed that this balance did not become due and no action to recover therefor could be maintained until such an order had been made. It rested with the corporation by proper orders and notices or other acts to acquire the right to maintain an action.

It is the case of a creditor or obligee holding by the terms of
141 the contract the power to acquire by his own act the right to maintain an action upon the contract. It is plain that this power must be exercised at a just and reasonable time and not hastened or delayed to the prejudice of the other party.

In the case before us, if the position of counsel for plaintiff be correct, no act of the corporation was ever had requiring payment of the arrears due on the stock subscription. It is claimed that the order for the payment of the stock was not sufficient, for the reason that it was made by the executive committee of the directors, and no notice thereof was given to defendant and other stockholders.

If counsel's position be correct, no demand for payment was made for fourteen years or more. Surely the law will not permit a party by his own inaction to defeat the statute of limitations.

This statute does not commence to run until an action can be brought—that is, until the plaintiff acquired the right by
142 the terms of the contract to commence a suit thereon. It is very plain that by the terms of the contract the corporation had the right at any time to institute the suit.

But that right was to be exercised upon an order for payment and notice thereof. These acts thus pertain to the commencement of the action, being a part of the proceedings for the remedy, and depend upon the exercise of the will of the directors of the company, just as do the issuing of a notice or filing of a petition in the action.

Surely it would be wholly unreasonable to say that the company had not the right to commence an action for the reason that it had not ordered payment and given notice thereof. In support of these views see the following cases: Baker *vs.* Johnson Co., 33 Iowa, 151; Prescott *vs.* Gouser, 34 Iowa, 175; Hintrager *vs.* Hennessy, 46 Iowa, 600; Squire *et al. vs.* Parks *et al.*, 56 Iowa, 407; Ball *vs.* K. & U. W. R'y Co., 62 Iowa, 751; Lower *vs.* Miller, 66 Iowa, 408; Hintrager *vs.*

Trant, 69 Iowa, 748; First Nat'l B'k of Garrettsville *vs.* Greene, adm., 64 Iowa, 445.

143 III. It is insisted that defendant is precluded by the order of the court, in 1886, requiring payment of arrears of the stock due from stockholders, for the reason that he is to be regarded as a party to that proceeding; but he was not, in fact, such a party. The record does not show that he was, and the law did not require that he should be made a party to the proceeding wherein the receiver was appointed. The court, by its order, assumed to do what the company thought its directors were required to do. The directors in calling in payments for the stock were not required to notify the stockholders of their proposed action and give them an opportunity to appear and object. They were probably entitled to notice thereof after the order for payment, but not to notice before it was made. In our opinion, the action of the plaintiff is barred by the statute of limitations. Other questions in the case need not be considered.

Affirmed.

144 And on the same day a final judgment was rendered against plaintiff, the record thereof being in the words and figures following, to wit:

"THE GREAT WESTERN TELEGRAPH COMPANY, for Use of ELIAS R. BOWEN, Receiver, Appellant,
vs.
HIRAM PURDY. } From Des Moines District Court.

In this cause, the court being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that *procedendo* issue accordingly. It is further considered by the court that the appellant pay the costs of this appeal, taxed at $152.00, and that execution issue therefor."

145 And afterwards the appellant filed in said court a petition for rehearing, and on the 3d day of February, 1892, the same was overruled without any further or supplemental opinion.

And afterwards, on the 11th day of March, 1892, there were filed in the office of the clerk of said supreme court, by the plaintiff in error, the following:

Petition for writ of error,

Writ of error,

Bond, and citation,

And the same are hereto attached in original form as a part of the return to said writ, true and correct copies thereof having been retained and lodged in the office of said clerk.

146 UNITED STATES OF AMERICA, } ss:
State of Iowa, }

In the Supreme Court of Iowa.

THE GREAT WESTERN TELEGRAPH COMPANY, for the Use of ELIAS R. BOWEN, Receiver, Appellant,
vs.
HIRAM PURDY, Appellee.

To the chief justice of the supreme court of Iowa:

Your petitioners, The Great Western Telegraph Company, for the use of Elias R. Bowen, its receiver, and also Elias R. Bowen, the receiver for said company, of the State of Illinois, respectfully represent unto your honor that a final judgment was entered by the supreme court of the State of Iowa on the fifteenth (15th) day of October, A. D. 1891, in the said cause therein pending, and wherein The Great Western Telegraph Company, for the use of Elias R. Bowen, its receiver, one of your petitioners, was appellant and Hiram Purdy was appellee, and by which judgment your petitioner believes that injustice has been done to said company and to him, said Bowen, one of your petitioners, as its receiver; and your petitioners represent that said cause was originally commenced in the Des Moines county district court, in the State of Iowa, to recover a debt claimed to be due the appellant, the said company, from the
147 said appellee, being the amount of an assessment called for and ordered to be paid by the appellee, as a stockholder of said company, by a certain order or decree of assessment rendered by the circuit court of Cook county, in the State of Illinois, on the 10th day of July, A. D. 1886, in a certain cause then and therein and now pending and undetermined, on the chancery side thereof, and wherein one Jeremiah Terwilliger and certain other persons, all of whom were and are stockholders of said company and suing therein on behalf of themselves and all others similarly situated, were and are complainants, and wherein one of your petitioners, the said The Great Western Telegraph Company, together with certain other persons, was and is a defendant, and wherein said company had been duly served with process and had appeared by counsel, and wherein, also, in the year A. D. 1874, and with the consent of said company, a receiver for it had been duly appointed; that at the time said cause was commenced against said appellee said decree of assessment was unreversed and was in full force and effect; that it ordered the appellee to pay the amount of $437.50 to and upon the demand of one of your petitioners, the said Elias R. Bowen, the receiver of said company; that previous to the commencement of said cause against said appellee your petitioner, said receiver, had demanded said sum from said appellee according to said order, but to which demand the said appellee had failed to comply; that in said cause, in said district court, your petitioner, the said
148 company, filed its certain amended petition and amendment thereto, and wherein it set forth that the said appellee was a stockholder of said company to the amount of fifty shares of its

stock, and that at the time of rendering said assessment decree there was a balance unpaid upon his said shares to the amount of $1,187.50; that a demand had been made upon him for the amount due from him according to the said decree of assessment, to which he had not complied, and therein also setting forth the contract of subscription of said appellee and copies of which were and are annexed as exhibits to said petition and the said decree of assessment, all of which is duly set forth in the record of said cause and in the abstract of such record, and to which your petitioners here refer, and wherein the same doth fully and at large appear.

Your petitioners further represent that afterwards the said appellee filed in said cause his answers to said amended petition and to the amendment thereto, and therein setting forth that he became a stockholder of said company on the 25th day of March, A. D. 1868, and had subscribed for fifty shares of its stock, of the par value of $25.00 each share, and had paid thereon the total sum of $275.00; that said appellee also set forth in said answers that said company's cause of action accrued more than ten years prior to the commencement of said cause, and that said cause was barred by the statute of limitations; and your petitioners refer to the said record and abstract, wherein the said answers do fully and at large
149 appear.

Your petitioners further represent that on the trial of said cause in said district court the said company introduced in evidence, among other things, the said contract of subscription for fifty shares of its stock, duly executed by the appellee, and also made proof therein of the said decree of assessment of the said circuit court of Cook county, in the State of Illinois, in the manner and form as required in such cases by the statutes of the United States and as required by such statutes to entitle it, in said cause, to the full faith and credit required by the Constitution of the United States and as provided by section 1 of article IV of said Constitution, and also made proof of said demand of payment upon said appellee in pursuance of said decree.

And your petitioners further represent that on the nineteenth (19th) day of April, A. D. 1890, judgment was rendered in said district court in said cause against your petitioner, the said company, for costs of suit; that an appeal was taken by it to the said supreme court of Iowa, and at the October term, A. D. 1891, of said supreme court, and on, to wit, the fifteenth (15th) day of October, A. D. 1891, the said judgment of said district court was affirmed, and thereupon your petitioner, the said company, petitioned said supreme court of Iowa for a rehearing of said cause, which, at the January term, 1892, thereof, to wit, on the third (3d) day of February, A. D. 1892, was denied.

150 Your petitioners show that the principal questions in said cause were whether the said decree of assessment of the circuit court of Cook county, Illinois, was conclusive upon the defendant and barred him from denying his liability under the same and whether full faith and credit should not be given to said decree by the said district court to the exclusion of the defense of the statute

of limitations which was pleaded by the said appellee; and your petitioners show that said company claimed in said cause and insisted, both in the trial thereof in the said district court and in said supreme court, that said courts should decide said questions affirmatively and therein insisted and claimed that under the Constitution and laws of the United States said decree of assessment conclusively established the liability of the appellee as therein claimed and the said company's right to recover therein, and that the plea or defense of the statute of limitations was not a defense in said cause nor available to said appellee therein, and that said decree also barred every one of his alleged defenses in said cause; that the said district court and also the said supreme court held, in said cause, against and notwithstanding the said claims of said company, that the statute of limitations was a defense, was available to the said appellee therein, and that the said demand of the said company was barred by the statute of limitations notwithstanding the said decree of assessment of the said Illinois court, and that the said decree neither created nor assisted to create any just or valid claim or demand against said appellee; and your petitioners show that the said
151 district court and the said supreme court of Iowa did therein and thereby refuse and omit to give to the said decree of assessment introduced in evidence in said cause that full faith and credit to which it was entitled in the said Iowa courts in said cause, as provided by the Constitution and the statutes of the United States of America, and especially therein and thereby violated and disregarded section I of article IV of the Constitution of the United States, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" also that part of section II of article IV of the Constitution of the United States which provides "that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" also that provision of article V of the amendments to the said Constitution which declares that no person shall be deprived of property without due process of law; also that provision of article XIV of the amendments to the said Constitution which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws; all of which the said company therein claimed and insisted that said courts and each of them should not do; and so your petitioners and each of them represent that the said company had in said cause rights, privileges, or immunities under said Constitution of the United States and the statutes of the United States made in pursuance thereof
152 which were denied to it by the said judgment of said district court and by the said judgment and decision of said supreme court of Iowa, and, as said court is the highest court in which a decision in said suit can be had, your petitioners represent that, under and in accordance with the provisions of the statutes of the United States in that behalf, the said company (appellant) is entitled to have said decision of affirmance by the said supreme court of the State

of Iowa reviewed by the Supreme Court of the United States by writ of error.

Your petitioners therefore pray that a writ of error, to operate as a supersedeas to said judgment of affirmance, may be allowed to have said records and proceedings in said cause reviewed by the Supreme Court of the United States, at Washington, in accordance with the statute in such case made and provided; and your petitioners will ever pray, etc.

March 5th, 1892.

THE GREAT WESTERN TELEGRAPH COMPANY,
By ELIAS R. BOWEN, *Receiver.*
ELIAS R. BOWEN,
Receiver of the Great Western Telegraph Company.

NEWMAN AND BLAKE AND
THOMAS J. SUTHERLAND,
Attorneys for Petitioners.

152½ [Endorsed:] 15345. G. W. Teleg Co., for use, etc., *vs.* Hiram Purdy. Pet. for writ of error. Filed Mar. 11, 1892. G. R. Pray, clerk sup. court.

The prayer of the within petition is hereby allowed. Bond of petitioner, The Great Western Telegraph Company, in the sum of four hundred ($400) dollars, with J. J. Towne as surety, is approved.

Signed at Iowa City, Iowa, this 9th day of March, A. D. 1892.

GIFFORD S. ROBINSON,
Ch. Justice of the Supreme Court of Iowa.

153 THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Iowa, }

The President of the United States of America to the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is before you in said supreme court, between The Great Western Telegraph Company, for the use and benefit of Elias R. Bowen, its receiver, plaintiff in error, and Hiram Purdy, defendant in error, wherein was claimed certain title, right, privilege, or immunity under the Constitution of the United States, and that the decision of said court was against said right, title, privilege, or immunity so set up and claimed, to the great damage of the said Great Western Telegraph Company, for the use of Elias R. Bowen, its receiver, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme

Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1892, in the Supreme Court to be then and there holden, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-
154 rect that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Des Moines, Iowa, this 9th day of March, A. D. 1892, and of the Independence of the United States the one hundred and sixteenth year.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk of the United States Circuit Court,
Southern District of Iowa, at Des Moines.

Allowed.

[Endorsed:] Gr. Western Telegr. Co., for use, etc., *vs.* Hiram Purdy. Writ of error.

155 Know all men by these presents that we, the Great Western Telegraph Company of the State of Illinois, as principal, and J. J. Towne, of the city of Des Moines, county of Polk and State of Iowa, as surety, are held and firmly bound unto Hiram Purdy in the penal sum of four hundred ($400.00) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this — day of March, in the year of our Lord one thousand eight hundred and ninety-two.

The condition of this obligation is such that whereas the said Hiram Purdy, on the nineteenth (19th) day of April, A. D. 1890, recovered a judgment in the district court of Des Moines county, Iowa, against the above-bounden The Great Western Telegraph Company, in a certain cause therein pending, wherein the said Great Western Telegraph Company was plaintiff and the said Hiram Purdy was defendant, for costs of suit, and which judgment was afterwards, on appeal therefrom, prosecuted by the said Great Western Telegraph Company, affirmed by the judgment of the supreme court of Iowa on the fifteenth (15th) day of October, A. D. 1891, with costs of appeal;

And whereas the above-bounden The Great Western Tele-
156 graph Company has sued out a writ of error from the Supreme Court of the United States to the supreme court of Iowa to reverse the said judgment of the said supreme court of Iowa in said cause: Now, therefore, if the above-bounden The Great Western Telegraph Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its

plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE GREAT WESTERN TELE- [SEAL.]
GRAPH COMPANY,
By ELIAS R. BOWEN, *Receiver.* [SEAL.]
J. J. TOWN. [SEAL.]

The foregoing bond is approved this 9th day of March, A. D. 1892. Signed at Iowa City, Iowa.

G. S. ROBINSON,
Ch. Justice of the Supreme Court of Iowa.

[Endorsed:] G. W. Teleg Comp'y, for use, etc., *vs.* Hiram Purdy. Bond. Filed Mar. 11, 1892. G. B. Pray, clerk supreme court.

157 UNITED STATES OF AMERICA, } *ss:*
State of Iowa, }

To Hiram Purdy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein The Great Western Telegraph Company, for the use of Elias R. Bowen, its receiver, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment rendered against said plaintiff in error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Gifford S. Robinson, chief justice of the supreme court of Iowa, this the 9th day of March, in the year of our Lord one thousand eight hundred and ninety-two.

GIFFORD S. ROBINSON,
Ch. Justice of the Supreme Court of Iowa.

157½ [Endorsed:] G. W. Teleg. Comp'y, for use, etc., *vs.* Hiram Purdy. Citation.

STATE OF IOWA, } *ss:*
Des Moines County, }

Rec'd the within notice for service on the 12th day of March, 1892, and I hereby certify and return that on the 12th day of March, 1892, I served the within notice on the within-named Hiram Purdy by reading the same to him personally and by then delivering to him personally a copy of the within notice in Burlington township, Des Moines county, Iowa.

SAM. B. HUNT,
Sheriff Des Moines County, Iowa,
By A. KRIECHBAUM, *Sp'c'l Deputy.*

Fees, $2.10, paid by Newman & Blake, att'ys.

STATE OF IOWA, }
Des Moines County, } *ss:*

I, A. Kriechbaum, being duly sworn, on my oath state that I served the foregoing citation on the said Hiram Purdy named therein, as stated in the above return, by reading the same to him personally and delivering to him a true copy of the same in Burlington township, Des Moines county, Iowa, his place of residence, on the 12th day of March, A. D. 1892.

A. KRIECHBAUM.

Subscribed and sworn to by said A. Kriechbaum before me this 24 day of March, A. D. 1892.

In witness whereof I have hereunto set my hand and official seal the day and date above written.

[Seal of the District Court of Des Moines Co., Iowa.]

W. D. INGHRAM,
Clerk District Court of Des Moines County, Iowa,
By J. P. INON, *Deputy.*

Aff. p'd by Newman & Blake, 50 cts.

158 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of a cause tried and determined in said supreme court between The Great Western Telegraph Company, for the use of Elias R. Bowen, receiver, plaintiff, and Hiram Purdy, defendant, to wit, the record whereon said cause was tried, together with the decision by said court and its final judgment therein rendered.

And I further certify that the petition for writ of error for the removal of said cause to the Supreme Court of the United States, the writ of error, bond, and citation are attached to this transcript in original form as a part of the return to said writ, and I have retained true copies thereof and the same are lodged in my office, and this return is made in obedience to said writ of error.

159 In testimony whereof witness my signature and the seal of said court, at Des Moines, Iowa, this 26th day of March, 1892.

[Seal of the Supreme Court, Iowa.]

G. B. PRAY,
Clerk Supreme Court, Iowa.

160 UNITED STATES OF AMERICA, *ss:*

Assignment of Errors.

In the Supreme Court of the United States, October Term, A. D. 1892.

THE GREAT WESTERN TELEGRAPH COMPANY, for the Use of ELIAS R. BOWEN, its Receiver, Plaintiff in Error, *vs.* HIRAM PURDY, Defendant in Error. } In Error to the Supreme Court of the State of Iowa.

And now comes the said Great Western Telegraph Company, for the use of Elias R. Bowen, its receiver, plaintiff in error, in the above-entitled cause, by Geo. F. Harding, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The said supreme court of the State of Iowa erred in holding and deciding that the district court of Des Moines county, in said State, where said cause was originally commenced and
161 & 162 tried, did not err in holding and deciding in said cause, upon the trial thereof, that the said decree of assessment of the circuit court of Cook county, Illinois, and the said demand made upon said defendant, Purdy, thereunder, together with his said contract of subscription, which were introduced in evidence and duly proved on the trial of said cause in said district court, together with the other evidence introduced at said trial, did not entitle the said plaintiff to a finding and a judgment in its favor and against said defendant, and in entering a judgment in favor of said defendant and against said plaintiff for costs.

2d. The said supreme court of Iowa erred in holding and deciding that the said district court did not commit error in holding and deciding upon the trial of said cause that the said decree of assessment of the circuit court of Cook county, Illinois, together with the making of said demand thereunder, introduced in evidence
163 and proved at the trial of said cause in said district court, notwithstanding the other evidence introduced upon said trial, did not create a right of action therein in favor of plaintiff and against said defendant, Purdy, and that the said decree of assessment was not conclusive in said cause and upon said trial to establish the liability of said defendant to pay the plaintiff according to its terms or to pay the plaintiff any sum or sums of money whatever, and in thereupon entering judgment in favor of defendant and against the plaintiff for costs.

3d. The said supreme court of the State of Iowa erred in holding and deciding that the said district court did not commit error at the trial of said cause therein in refusing and omitting to give and extend to the said decree of assessment so introduced in evidence at said trial as aforesaid as evidence and the same faith and credit

as evidence therein to which it was at the time of said trial
164 and has at all times subsequent to the making and entering thereof been entitled to and has received in all the courts of the said State of Illinois in all actions or proceedings commenced and conducted therein and under said decree and against the stockholders of said plaintiff and to enforce the collections and payments therein and thereby ordered and otherwise, and in therefore holding and deciding that the several defenses of the said defendant, Purdy, or one or more of them, including the defense of the statute of limitations of the State of Iowa of ten years, interposed at said trial of said cause on the part of the defendant were valid and effectual defenses and constituted a bar to plaintiff's said action, and in thereupon entering judgment in favor of defendant and against the plaintiff for costs.

165 4th. The said supreme court of the State of Iowa erred in holding and deciding that the said district court did not commit error in holding and deciding at the trial of said cause that the said decree of assessment introduced in evidence at such trial was not conclusive of and did not establish the liability of said defendant in said cause and did not preclude and render unavailing on behalf of said defendant the plea or defense interposed by him of the statute of limitations of the State of Iowa of ten years, and that the plaintiff's cause of action accrued more than ten years prior to the commencement of this said action in said district court, and in entering judgment against the plaintiff in pursuance of such holding, whereas such holding by said district court was to unlawfully deny said decree any and all force and effect or faith and credit as evidence in said cause.

166 5th. The said supreme court of the State of Iowa erred in holding and deciding that the said district court did not commit error in holding and deciding on the trial of said cause that the said decree of assessment introduced in evidence did not create or fix the said defendant's liability after said demand made thereunder to pay the amount he was ordered to pay by its terms, and that the plaintiff's right of action to recover such amount accrued to it previous to the making and entering of said decree, and that the said decree of assessment neither created nor assisted to create any liability on the part of defendant to pay the amount or any portion thereof claimed by the plaintiff in said action in said district court, whereas the said supreme court should have held and decided that the said district court erred in so holding, and that it should have held and decided on said trial that the contrary was the law, and should thereupon at the close of said trial have found the issues for the plaintiff and entered judgment in its favor against said defendant for the said amount claimed by the plaintiff on said trial.

167 6th. The said supreme court of the State of Iowa erred in holding and deciding that the said district court, upon the trial of said cause, did not commit error in refusing to allow therein the full faith and credit to the said decree of assessment introduced in evidence therein and to which it was therein entitled under the Constitution and the laws of the United States, and especially as provided

and vouchsafed by section I of article IV of said Constitution, and by reason thereof entered judgment therein in favor of said defendant and against the plaintiff for costs.

7th. The said supreme court of the State of Iowa erred in holding and deciding that the statute of limitations of the State of Iowa of ten years began to run against the plaintiff's right of action to recover of and from the said defendant all or any portion of the amounts unpaid upon his subscriptions to its stock, and especially that portion sought to be recovered in said action in said
168 district court and ordered to be paid by said decree previous to the making of said decree of assessment, and that all right of action of the plaintiff to recover the same or any portion thereof from the defendant had become barred by the statute of limitations of the State of Iowa previous to the commencement of said action in said district court, notwithstanding the making and entering of said decree of assessment and the making of said demand thereunder, proof — which was duly made on said trial, and in holding and deciding that the said district court on said trial did commit error for that reason in entering judgment in said action in favor of said defendant and against said plaintiff for costs, whereas by said holding and deciding the said supreme court as well as said district court refused to give the full faith and credit to said decree of assessment of the said circuit court of Cook county, in the State of Illinois, as evidence on the trial of said cause to which it was lawfully entitled and as required by the Constitution and the laws of the United States, and especially as required by section I of article IV of said Constitution.

169 8th. The said district court erred in entering judgment for the defendant in said action and against the plaintiff for costs, and the said supreme court of Iowa erred in affirming said judgment on the ground that the said action was barred by the statute of limitations, for the reason, among others, that such judgment by said district court and such judgment of affirmance by said supreme court were each made and were in disregard and in violation of the Constitution and the laws of the United States, and especially of that provision of the said Constitution known as and being section I of article IV thereof.

9th. The said supreme court of the State of Iowa erred in affirming the said decision and judgment of the said district court in said cause, and wherein the question as to what faith and credit should be given to the said decree of assessment as evidence in said trial was a direct issue, and wherein said decision and judgment of said district court, by disregarding said decree as evidence in said
170 cause on the part of said district court, *and which* was in violation and disregard of the Constitution and the laws of the United States, and especially of section I of article IV of said Constitution.

10th. The said district court erred in rendering the judgment in said cause against the plaintiff in error herein, thereby depriving it of the benefit of said decree of assessment, which constituted and was the basis and cause of *his* action, and the said supreme court

erred in affirming said judgment of said district court. Wherefore said plaintiff in error prays that action and judgments of said district court and of said supreme court be reversed, etc.

GEORGE F. HARDING,
Attorney for Plaintiff in Error.

Room 51, No. 170 Madison St., Chicago, Illinois.

171 UNITED STATES OF AMERICA, *ss:*

To Hiram Purdy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein The Great Western Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this third day of May, in the year of our Lord one thousand eight hundred and ninety-two.

MELVILLE W. FULLER,
Chief Justice of the United States.

172 This writ came into my hands for service May 7, '92, and I served the same on the within-named Hiram Purdy by reading the same to Mrs. E. Purdy; also by leaving with her at the same time a true copy of this writ at Burlington, Iowa, at the house of said Hiram Purdy, she being at the time a member of his family and over the age of 15. All done on the 20th day of May, 1892.

D. B. MILLER, *U. S. M.*,
By HARRY FULTON, *Dep't.*

Fees, 4.70, paid by Thomas J. Sutherland.

173 *Amended Return.*

This writ came into my hands for service May 7th, 1892, and I served the same on the within-named Hiram Purdy by reading the same to Mrs. E. Purdy, she being the wife of said Hiram Purdy, and at the same time leaving with her a true copy of this writ at the dwelling-house of said Hiram Purdy, the same being his usual place of residence, in the city of Burlington and State of Iowa, said Mrs. E. Purdy being at the time a member of the family of said Hiram Purdy and over the age of fifteen years. The reason of the serving and the reading and delivering of the copy to Mrs. E. Purdy, wife of said Hiram Purdy as aforesaid, being that "the defendant

not being found," the above service being had and done on the 20th day of May, A. D. 1892.

D. B. MILLER, *U. S. Marshal*,
By HARRY FULTON, *Deputy*.

Fees, 4.70, paid by Thomas J. Sutherland.

[Endorsed:] U. S. Sup. C't. Citation in G. W. Tel. Co. *vs.* Purdy.

174 [Endorsed:] Case No. 15,014. Supreme Court U. S., October term, 1892. Term No., 1049. The Great Western Telegraph Co., pl'ff in error, *vs.* Hiram Purdy. Citation & proof of service.

[Stamped:] Office Supreme Court U. S. Filed Jun- 13, 1892. James H. McKenney, clerk.

Endorsed on cover: Case No. 15,014. Iowa supreme court. Term No., 1049. The Great Western Telegraph Company, plaintiff in error, *vs.* Hiram Purdy. Filed April 11, 1892.

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

THE GREAT WESTERN TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
HIRAM PURDY,
Defendant in Error.

No. ~~728~~ 105

Error to the Supreme Court of Iowa.

Motion to Advance.

The plaintiff in error, The Great Western Telegraph Company, ~~by George F. Harding, its attorney, and counsel,~~ comes and now here moves the court to advance this cause, and set it down for argument at an early convenient day, and respectfully shows to the court the following *special and peculiar reasons and circumstances,* as the grounds of this motion.

The question presented in this cause, is the right in the District Court of Des Moines County, Iowa, and in the Supreme Court of Iowa, in this suit, to have full faith and credit given to the decree of assessment of the Circuit Court of Cook County, Illinois (Rec. 5–9), made and entered by said court on the tenth day of July, A. D. 1886, in the chancery cause of *Jeremiah Terwilliger et al.* v. *The*

Great Western Telegraph Company et al.; and also, as a necessary consequence, in all suits that may be commenced in the courts of Iowa against the stockholders of the plaintiff, under and in pursuance of said decree and for the enforcement of its terms; and as to the right of said decree to receive in this suit, and other similar suits in the courts of Iowa, the same faith and credit which it receives, and has received, since it was made, in the courts of Illinois. (See *Great Western Telegraph Company* v. *Gray*, 122 Ill. 630.)

The sole question determined in this suit in the Supreme Court of Iowa, (the court below) was as to the force and effect of the said decree of assessment in creating a liability upon the defendant, Purdy, and a cause of action against him; and the sole ground of the decision of said Supreme Court, affirming the judgment of the said District Court, was its holding that said decree was not conclusive upon the defendant in the courts of Iowa, and did not create any liability on his part to pay according to its terms; (Rec, 90–2) (See 83 Ia. 430), notwithstanding the decision of the Supreme Court of Illinois, affirming the validity and conclusiveness of such decree. (*G. W. Tel. Co.* v. *Gray*, 122 Ill. 630.) The Supreme Court of Iowa, denying the conclusiveness of said decree and refusing to give to it that "full faith and credit," accorded thereto by the Supreme Court of Illinois, held that the alleged *laches* of the *officers* of the plaintiff, in not calling for the unpaid balances due upon the subscriptions, from the defendant and the other stockholders, prevented the said chancery court of Illinois from being able to make a valid decree, and that the said decree was invalid for that reason, and not conclusive and binding upon the defendant in this law action.

The cause involves the interests of several thousands of persons, resident in divers States and jurisdictions of the United States, (being the creditors and stockholders of the plaintiff) and of the gravest character. The said creditors whose claims were duly adjudicated in the said chancery cause in the Illinois court, are obliged to await payment through the action of the court in that cause. Such claims

with interest, now amount to the sum of more than *five hundred thousand* dollars.

At the time of the making of the decree, the stockholders or their representatives, to the number of over 1,000, resided in the State of Illinois, the domicile of the plaintiff; over 300 in the State of Wisconsin, upon whose subscriptions more than $200,000 were due and unpaid; over 500 in Iowa, and upon whose subscriptions more than $300,000 were due and unpaid; about 500 in Kansas, upon whose subscriptions nearly $500,000 were due and unpaid; nearly 200 in Nebraska, and upon whose subscriptions about $150,000 were due and unpaid; nearly 100 in Indiana, upon whose subscriptions about $100,000 were due and unpaid; nearly 500 in Missouri, upon whose subscriptions about $350,000 were due and unpaid; while the balance of the stockholders resided in more than seventeen different states, and other places.

By reason of the fact that the subscriptions to the stock were made in the years 1868 to 1871, and the long delay, a large number of the stockholders either died or became insolvent before the making of the decree of assessment; and subsequently thereto, the mortality among them has largely increased, and the difficulty of collecting sufficient from them under said decree to pay the debts, has consequently been greatly augmented.

Because, also, of the said opinion and decision of the Supreme Court of Iowa (Oct. 15, 1891), now before this court herein for review, and the rendering of an opinion of a similar character, by the Supreme Court of Wisconsin, some months previous thereto (Nov. 16, 1890) in *Great Western Tel. Co.* v. *Burnham*, 79 Wis. 47, also removed to this court, and now pending herein, as Number 805, the receiver of the plaintiff has been prevented from commencing any other suits, in Iowa or in Wisconsin, or in the other of said States without the State of Illinois, and has therefore not been able to enforce collections under said decree, from the said stockholders, resident in those States, to the great loss and damage to the estate of plaintiff, and its creditors; and

it is impossible for the said receiver to make any effort to enforce collections from such stockholders without the State of Illinois, until the court has decided this cause, and the said cause of this plaintiff against Burnham et al.

That the demands under said decree were made by the said receiver upon the stockholders outside of Illinois, in the years 1886, 1887 and 1888, and the statute of limitations is likely to bar proceedings for collections in those States in a short time, unless the said receiver is permitted to undertake the same at an early day. That by reason of the said decision of the Supreme Court of Iowa, and the consequent interference thereby, with the collections in that State, the loss therein to the plaintiff and its creditors, in connection with the liability of the stockholders residing in that State, has been not less than the sum of $50,000, while the loss occasioned thereby, and also by the said decision of the Supreme Court of Wisconsin, in the other States named, by reason of the plaintiff's inability to make collections there, as aforesaid, has been correspondingly large, so that the rendering of those decisions has inflicted an irreparable injury to the plaintiff and its creditors, and such injury will be constantly increased while they shall remain unreversed.

Said decisions have also greatly injured the rights of the large body of the stockholders of the plaintiff residing in *Illinois*, against whom only, the receiver of the plaintiff is now able to enforce collections under said decree, and who are thus forced to discharge a responsibility, from which the others of said stockholders are shielded by the said decisions.

This cause also involves the right of a corporation organized under the laws of the sovereign State of Illinois, to pursue in other States, the trust funds in the possession of its stockholders there residing;—being the unpaid stock subscriptions. It also involves considerations of the gravest character in this, that it involves the right to have respected and enforced in the said Supreme Court of Iowa, in this suit, section 1 of article IV of the Constitution of the United States, and the laws of Congress in relation thereto.

It also involves the rights and liabilities of a large body of persons, *as* a "*class.*" The position and difficulty of the plaintiff, and its receiver is now practically the same that it would be, if actions were already pending against all of its stockholders in the States of Iowa and Wisconsin, and in the other States outside of Illinois, and which, of course, could not safely be proceeded with until the said decisions, now before this court, were reviewed, and the extent of "faith and credit," to which the said decree of assessment of the Illinois Chancery Court was entitled, should be thus determined. The *principle* seems identical, as in the present instance, the plaintiff is ready to begin the actions at law; and the only difference in the two conditions being the extra expenditure of some court costs, and the labor necessary for the actual commencement of the cases. (See *Hoge* v. *R. R. Co.*, 3 Otto 2–3.)

The plaintiff's interests, therefore, and those of its said stockholders in Illinois, and also, those of its creditors, will be irremediably injured if this cause is compelled to await before hearing can be had, its turn, in the regular call of causes upon the docket of this court.

Wherefore the plaintiff prays that its said cause and writ of error may be advanced.

Plaintiff also prays that this cause be argued and heard together with the cause of *The Great Western Telegraph Company* v. *Burnham et al.*, now pending in this court, as number 805 of this term, as they involve substantially the same questions.

By Thomas J. Sutherland

GEORGE F. HARDING,

Counsel for Plaintiff in Error, The Great Western Telegraph Company.

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss. Frank A. Helmer, being duly sworn, on oath, states that he is the receiver of the Great Western Telegraph Company, the above named plaintiff in error, having been duly appointed such, in the case of *Jeremiah*

Terwilliger et al. v. *the said company et al.*, now pending in the Circuit Court of Cook County, Illinois, and as the successor therein of Elias R. Bowen, deceased, who was the former receiver of said plaintiff; that he has read the foregoing motion and reasons therein contained and knows the contents thereof, and that the same are true as he is informed and verily believes.

FRANK A. HELMER.

Subscribed and sworn to before me this 16th day of February, A. D. 1894.

[SEAL]

E. B. SHERMAN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss. William P. Black, being duly sworn, deposes and says, that he is the *solicitor* of the Great Western Telegraph Company, and of Frank A. Helmer, its receiver, in the cause of *Jeremiah Terwilliger et al.* v. *The Great Western Telegraph Company et al.*, now pending in the Circuit Court of Cook County, Illinois, referred to in the foregoing motion, and reasons; that he has read the foregoing motion, and reasons therein contained, of said company, the said plaintiff in error, and knows the contents thereof, and that the same are in all respects true, as he is informed and verily believes.

WILLIAM P. BLACK.

Subscribed and sworn to before me, this 16th day of February, A. D. 1894.

[SEAL]

E. B. SHERMAN,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss. Thomas J. Sutherland, being duly sworn, deposes and says that he is the attorney of Frank A. Helmer, as receiver of the great Western Telegraph Company, the plaintiff in error above named; that he was one of the attorneys for the plaintiff in

the said cause of said company v. Hiram Purdy, in the District Court of Des Moines County, and Supreme Court of Iowa; that he has read the foregoing motion, and reasons therein contained, and knows the contents thereof, and that the same are true, as he is informed and verily believes.

THOMAS J. SUTHERLAND,

Subscribed and sworn to before me this 12th day of February, A. D. 1894.

[SEAL]

E. B. SHERMAN,
U. S. Commissioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE GREAT WESTERN TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
HIRAM PURDY,
Defendant in Error.

TERM NO. 728.

Error to the Supreme Court of the State of Iowa.

TO HIRAM PURDY, DEFENDANT IN ERROR,
BURLINGTON, IOWA.

Take notice that the plaintiff in error in said cause will, on Monday, the 19th day of March, A. D. 1894, at the opening of said court on that day, present to the justices of said Supreme Court, at the court room of said court at the city of Washington, in the District of Columbia, the foregoing motion and reasons, with affidavits attached, copies of which are herewith delivered to you, and shall then and there ask the said court to grant said motion. The said plaintiff in error, will also then and there move the said court for an order that the cause of the *Great Western Telegraph Company* v. *Burnham et al.*, Number 805, now pending in said court, be advanced and argued and heard, together with the above entitled cause, upon the ground that they involve substantially the same questions.

Chicago, Illinois, February 12, 1894.

GEORGE F. HARDING,
Counsel for the Plaintiff in Error, The Great Western Telegraph Company.

SUPREME COURT, U. S.
FILED
OCT 19 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

Term No. 105.

THE GREAT WESTERN TELEGRAPH COMPANY, ETC.,
Plaintiff in Error,

vs.

HIRAM PURDY,
Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

BY THOMAS J. SUTHERLAND,
Of Counsel for Plaintiff in Error.

WILLIAM P. BLACK,
Of Counsel.

PRINTED BY THE CHICAGO LEGAL NEWS CO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE GREAT WESTERN TELEGRAPH COMPANY,
Plaintiff in Error,
vs.
HIRAM PURDY,
Defendant in Error.

TERM NO. 728

Error to the Supreme Court of the State of Iowa.

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BURLINGTON, IOWA:

Take notice that the plaintiff in error in said cause will, on Monday, the 19th day of March A. D. 1894, at the opening of said court on that day, present to the justices of said Supreme Court, at the court room of said court at the city of Washington, in the District of Columbia, the foregoing motion and reasons, with affidavits attached, copies of which are herewith delivered to you, and shall then and there ask the said court to grant said motion. The said plaintiff in error will also then and there move the said court for an order that the cause of the *Great Western Telegraph Company* v. *Burnham et al.*, Number 805, now pending in said court, be advanced and argued and heard, together with the above entitled cause, upon the ground that they involve substantially the same questions.

Chicago, Illinois, February 17, 1894.

GEORGE F. HARDING,
Counsel for the Plaintiff in Error, The Great Western Telegraph Company.

SUPREME COURT, U. S.
FILED
OCT 19 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

Term No. 105.

THE GREAT WESTERN TELEGRAPH COMPANY, ETC.,
Plaintiff in Error,

vs.

HIRAM PURDY,
Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

BY THOMAS J. SUTHERLAND,
Of Counsel for Plaintiff in Error.

WILLIAM P. BLACK,
Of Counsel.

PRINTED BY THE CHICAGO LEGAL NEWS CO.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE GREAT WESTERN TELEGRAPH COMPANY, ETC.,
Plaintiff in Error,

vs.

HIRAM PURDY,
Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

Brief of Thomas J. Sutherland, of Counsel for Plaintiff in Error.

Statement.

The plaintiff in error herein is a corporation, organized in the year 1867, in the State of Illinois, under a statute of that State, entitled an "Act for the establishment of telegraphs," and which was enacted and went into effect in 1849. The defendant, Purdy, is a stockholder of the plaintiff residing in the State of Iowa. A receiver was appointed for the plaintiff by the Circuit Court of Cook County, Illinois, in 1874, and on July 10, 1886, the court made a decree of assessment, ordering the payment, by the stockholders of the company, of 35 per cent of the par value of the stock subscribed for by them, or $8.75 on each share, for the payment of the plaintiff's indebtedness, previously adjudicated.

The defendant Purdy, on February 16, 1869, had subscribed for fifty shares of the plaintiff's stock, upon which he had, previous to the said assessment, paid thereon the sum of $275, leaving unpaid the sum of $975. The decree of assessment called for $437.50 from the defendant, and after demand for the payment of this sum had been duly made upon the defendant on the 28th day of August, 1888, and payment refused, action for its recovery was begun in the District Court of Des Moines County, Iowa, where the defendant has always resided. Upon trial before that court without a jury, it found the issues for the defendant, and rendered judgment against the plaintiff therein, and for costs of suit.

From that judgment the plaintiff appealed to the Supreme Court of Iowa, where the judgment was affirmed, the opinion of said Supreme Court being found in the abstract, pages 90–2, and in 83 Iowa 430. This final judgment of the Iowa Supreme Court is now brought to this court by the present writ of error, for the purpose of re-examination and reversal, upon the Federal question involved under section I, of article IV, of the Constitution of the United States, and section 709 of the Revised Statutes.

The amended petition of the plaintiff filed in the District Court of Des Moines County, together with a copy of the defendant's subscription, and a copy of the decree of assessment of the Illinois Court, which were attached to and made a part of such petition by due reference, fully set out the plaintiff's case. They are found on abstract, pages 1 to 9.

We will now present a brief history of this litigation in the Illinois Chancery Court leading up to, and involving the decree of assessment, now sought to be enforced in this case against the defendant Purdy in the District Court of Iowa; also directing attention to the decisions of the Illinois Appellate Courts as to the character and sufficiency of the decree, which in and of itself, contains in detail a recital of the essential proceedings in the suit upon which the assessment was based.

In 1869, one Jeremiah Terwilliger and certain other persons, who were stockholders of the plaintiff, exhibited their bill to the Circuit Court of Cook County, Illinois, making the plaintiff and its officers, and one Selah Reeve, a contractor, parties defendant, seeking thereby to set aside certain contracts theretofore made with the plaintiff company, by said Reeve, and also certain relief touching the rights of the real stockholders of the company, and for general relief. This suit was prosecuted by appeal to the Supreme Court, where that court rendered judgment reversing the decree of the Circuit Court and setting aside the Reeve contracts, declaring that the real and original stockholders were the complainants and all others who had subscribed for stock, signing contracts like these signed by Terwilliger and his co-complainants. It also ordered an accounting in the same case in the Circuit Court with the defendant Reeve.

Subsequently, and on the 16th day of November, 1872, said suit having been redocketed in the Circuit Court, a decree was entered by that court in pursuance of the Supreme Court opinion, and providing therein that application "for such further order or decree, at the foot of this decree as shall be necessary to carry out this decree, *or as shall be necessary in this cause.*" [Abst. 14–17.] The defendant, *Purdy* became and was personally a party complainant to this chancery suit before the appeal to the Supreme Court of Illinois, and his name is found among those of the complainants in the title of the cause at the head of the decree of November 16, 1872 [Abst. 15], as well as in that at the head of the decree of assessment itself. [Abst. 5.]

The amended petition in this case also charges that *Purdy* was a complainant in the *Terwilliger* case [Abst. 2], and which was admitted by him in his answer thereto, in the following words: "Denies that he paid anything upon his alleged subscription after he became a party to the case of Terwilliger and others against the plaintiff and others, *which was some time in the year 1869.*" Also on the trial of this action in the District Court D. P. Stubbs testified

[Abst. 18]: "I surrendered receipts, showing that Mr. Purdy had paid to the company $275. I was attorney at the time for Purdy in the Terwilliger suit. Purdy was a party to that suit."

And the defendant, Purdy, testified herein [Abs. 39]: "I was a party with Stubbs in the Terwilliger case. I became a party shortly after I paid, along in the spring of 1870. I had paid $275 before this." See also Stubbs' and Purdy's testimony for defense. [Abst. 87–8.]

In 1874, one Jones and certain other stockholders of the plaintiff, made themselves of parties complainant in the Terwilliger suit, and filed therein by leave of court a supplemental bill or petition, setting up mismanagement of the officers of the company and insolvency and praying for the appointment of a receiver, etc. [Abst. 33–5.] That afterward, on October 5, 1874, the company itself stipulated for the appointment of a receiver, and for the adjudication in said suit of the indebtedness. On October 7, 1874, the receiver was appointed by the order of the court [Abst. 36], and by the same order the cause was referred to the master for proof of claims against the company. Subsequently the entire indebtedness was therein adjudicated and the said decree of assessment rendered on July 10, 1886. [Abst. 5–9.]

The Decree of Assessment.

It recites the petition of the receiver for an assessment, and the report of the master recommending the same, as the result of a reference and hearing; finds and recites the incorporation of the company in 1867, under the law of 1849; that the suit was begun in 1869, with service upon the company, and pendency ever since; that a receiver was appointed in 1874, upon supplemental bill, and by stipulation and consent of the company; that the indebtedness exceeds $375,000; that upon reference had for the purpose the entire indebtedness had been adjudicated, and that all of the creditors had made themselves parties; that the tangible property had been sold and proceeds distributed to the creditors; that there was nothing remaining to pay the debts

save the unpaid balances due from the stockholders, which numbered about 2,000, scattered through more than twelve different States and Territories, each and all of whom owed an unpaid balance of not less than $15 on each share of stock subscribed for by them; that their liability was based upon contracts of subscription made with the company, in and by which contracts they each agreed to take the number of shares subscribed for by them and pay for the same as follows: Five per centum of the par value thereof at the time of subscribing, and the balance as the directors of the plaintiff company should from time to time order; that 35 per cent of the par value of each share of stock subscribed for should be required to be paid by the stockholders for the purpose of paying such indebtedness.

It also orders such an assessment, and that payment be made to the receiver upon his demand, and that upon default the receiver "takes such action, and institute such suits and proceedings in the name of the said company, and in such jurisdictions as he shall be advised or deemed expedient and proper and for the purpose of enforcing the payment of the sums hereby ordered paid."

Subsequent to the making of this assessment, one *Gray*, a stockholder, who had subscribed for 100 shares of the company's stock, and who owed an unpaid balance thereon of $15, each share, was sued for the amount due from him by the terms of the assessment decree. The case was appealed to the Supreme Court of Illinois, and is entitled, *Great Western Telegraph Company* v. *Gray*, 122 Ill. 630.

The whole decree was made a part of the plaintiff's declaration, and was before the Supreme Court, and was considered by it, and pronounced valid and binding upon the defendant Gray, as well as upon all of the other stockholders of the company. The court said [634]: "The declaration sets forth fully the above and other requisite facts, stating particularly the proceedings in said chancery suit, and giving a copy of the decree of assessment." [Then follows a copy of the contract of subscription.] * * * There is nothing in the point as to the statute of limitations.

Although the contract was made in 1868, it was to pay as the directors, from time to time, might order. The directors neglected to make order for the payment. A court of equity then might make the order in place of the directors. (*Scoville* v. *Thayer*, 105 U. S. 155; *Glenn* v. *Sexton*, 68 Cal. 353.) The order of assessment or call for payment made by that court was in 1866. Until then, as we view it, the cause of action did not accrue, and since then there has not been time for any period of limitations to run. *Scoville* v. *Thayer, supra.*"

The Supreme Court also held that the assessment decree was valid, notwithstanding the fact that the stockholders were not present in person, when it was rendered, holding that the presence of the company in the chancery case, sufficiently represented the stockholders; and also, that the law of Illinois, relating to corporations, enacted in 1872, had no application to the company, or any litigation concerning it [637–8], and citing 2 Morawetz on Corp., Sec. 822; *Ward* v. *Farwell*, 97 Ill. 593; *Glenn* v. *Williams*, 60 Md. 93; *Sawyer* v. *Upton*, 91 U. S. 56; and affirming its former decisions to the effect that the law of 1872, affected only corporations organized subsequent to its passage (*Wincock* v. *Turpin*, 96 Ill. 135; *Stevens* v. *Pratt*, 101 Ill. 219). The court then proceeds [638–9] to recite the language of the decree, as to the appointment of the receiver and proceedings as to the assessment, and says:

"There was here, then, a receiver appointed by a court of equity to collect the assets of the corporation for the benefit of its creditors. The unpaid part of the defendant's subscription to the capital stock of the corporation was a part of such assets. The validity of the receiver's appointment can not be questioned in this collateral proceeding. The court had jurisdiction of the subject-matter, and acquired jurisdiction to appoint the receiver by service of process upon the corporation. Defendant's promise was to pay as the directors from time to time might order. The directors, who were defendant's agents, having neglected to make order

for payment, a court of equity, in their place, as before said, might make the order.

The court here did make such order, and thereupon, or at least after demand made, defendant's legal liability upon his contract was complete to pay the remaining amount of his stock subscription. There was then a perfect cause of action against him. His liability was to pay the entire remaining unpaid amount of sixty per cent of his subscription—at least to the extent needed to pay the debts of the corporation. Assessing him with only his ratable part thereof (thirty-five per cent) was in mitigation of his legal liability, doing him an equity, and affording no just cause of complaint. In order for the board of directors to have made a valid order for payment, it would not be contended, we presume, that defendant should have been before the board. No more, we conceive, was it necessary that the defendant should have been before the court, when it, in place of the directors, made the call or order of assessment."

According to the opinion, the right of action under the decree could not accrue, until demand had been made for payment according to its terms. This was, also, in affirmance of the court's previous opinion upon the subject. (*Barrett* v. *A. & S. R. R. Co.*, 13 Ill. 513; *Spangler* v. *Indiana and Illinois Central Railroad Co.*, 21 Ill. 276; *Wear* v. *Jacksonville & Savannah R. R. Co.*, 24 Ill. 596; *Stone* v. *Great Western Oil Co.*, 41 Ill. 95–6; *Cole* v. *Joliet Opera House Co.*, 79 Ill. 98.)

The Supreme Court of Illinois thus determined that the statute of limitations could not begin to run as against a right of action to enforce this assessment decree, from any point of time previous to the time of making a demand for payment under it.

For all the purposes of collateral actions to enforce it, the decree itself, notwithstanding the judicial approval of other courts, was, until reversed, entitled to *full faith and credit*, and the equal respect of every other *nisi prius* court in Illinois, and in every other State, to that given to it by the Circuit Court of Cook County, Illinois, and which was

involved in its promulgation. But it came regularly for review before the highest court of the State—*the corporation's domicile*—and its validity was pronounced. It was declared to create a cause of action, when coupled with a demand, against the stockholders, and not till then, and such cause of action could not be barred until the prescribed statutory limit had thereafter expired.

This decision in the *Gray* case was rendered at the November term, 1887, of the Supreme Court. On March 13, 1889, in another action under the same assessment decree, the Appellate Court of the First District of Illinois treated the decision in the *Gray* case as conclusive on all other courts, and in *Hoagland* v. *The Great Western Telegraph Company*, 30 Ill. App. 304, said: "This case in all its material facts * * * is like the case of this *Appellee* v. *Gray*, 122 Ill. 630. If the doctrine of that case is to be reversed, it is for the Supreme, and not for this court to do it * * * [307]. If there is any error in this case, it is upon questions which the case in 122 Ill. binds this court to leave untouched."

And the same court in reversing the case of *Great Western Telegraph Company* v. *Bush*, 35 Ill. App. 215, again said (January 4, 1890): "Whether the case of these plaintiff's v. Gray is to be adhered to, is a question for the Supreme Court." The same court again in *Bates* v. *Great Western Telegraph Co.*, 35 Ill. App. 255 (January 22, 1890), in affirming a decree of the Circuit Court of Cook County, Illinois, dismissing a bill filed by stockholders of the company to set aside the same decree by a *direct assault*, said: "Whether the appellants or any of them (they are thirty-four in number), are in the category of persons to be affected by the interlocutory decree, is an open question for them when the receiver sues them. Whether the Circuit Court ought to have made such an interlocutory decree or not, can not be made the subject of an original bill. The stockholders, though not parties by name to the former suit, are yet in such a relation to it, that if the interlocutory decree was improvidently made, they might, by petition in the cause, apply to the court to modify or

"vacate it. *Ward* v. *Farwell*, 97 Ill. 593, 618; *Upton* v. "*Hansboro*, 3 Bissell, 417, 426; *Sanger* v. *Upton*, 91 U. S. "56, 59; High on Receivers, Sec. 262. But an original "bill, which is in the nature of a review, lies only after a "final decree. Story's Eq. Pl., Secs. 408, 421. It would be a "singular state of things, that a decree, not appealable, "should be revised, and the effect of an appeal obtained by "an independent suit."

This decision of the Appellate Court was affirmed (October 31, 1890) in 134 Ill. 536, and the decision of the *Gray* case was there quoted at length, and affirmed. Such are the adjudications touching the decree in the courts of the domicile of the plaintiff corporation.

Before the 5th day of September, 1889, when the present action was commenced against the defendant, Purdy, in the Iowa court, not only had the decree of assessment been rendered by a competent court in Illinois, but it had been already sanctioned, and its validity in the courts of Illinois recognized, by one decision of the Supreme Court (Gray case) and one decision of the Appellate court. (Hoagland case.)

The Great Western Telegraph Company v. Hiram Purdy, now before this Court.

The amended petition of the plaintiff, filed in the District Court of DesMoines County in this case against defendant Purdy, with the exception of its stronger point in charging him with having been personally a party complainant in the Terwilliger chancery suit in Illinois, making, as it does, the defendant's contract of subscription, and also the said decree of assessment a part thereof, presented to that court by its pleadings, and there stated, the same cause of action, with the same decree and contract as that presented in the Gray case (122 Ill.) and in the Hoagland case, 30 Ill. App.

It thus, as an *Illinois* corporation, declared in the *Iowa* court upon a contract of subscription made with it, and to

be construed by the Illinois courts, but also upon a decree of assessment made with all proper parties before it, by an *Illinois* court, and wherein the creditors were bound to seek whatever relief was accorded to them. The petition therefore set forth the necessary facts to raise and present the implied demand, that the Iowa court should therein accord to the decree of the Illinois court, under the constitution and laws of the United States, that full faith and credit, which it was entitled to, and presumably did receive in the court which made it, and in every other court of the State of Illinois; and that no defense on the part of the defendant should therein be allowed to prevail as against the plaintiff's right of recovery that would not be available to him in the state of the plaintiff's domicile; and especially that the plea and defense of any bar to the action, by reason of the statutes of limitations of Iowa, or any other State, shall not be permitted to be successfully interposed, to overcome the otherwise conclusive character of the decree, and the cause of action thereby created.

The Federal question arising under Section I, of Article IV of the United States Constitution, and section 709 of the Revised Statutes, was not only directly necessarily involved in any decision that might be rendered in the case, but was the controlling question raised by the pleadings and the evidence introduced at the trial under them.

Defendant's Answer to Amended Petition.

1. *This* answer [Abst. 9–11, 47–52] denies generally every allegation of the amended petition.

2. *Admits* he signed a subscription contract for stock of plaintiff, similar to Exhibit "A," but charges that the corporation was fraudulent, and that the plaintiff had no stock, and hence his subscription was void.

3. *That* he bought his stock from one Reeve, and that as between him and the plaintiff, his stock was fully paid up, and no liability exists in favor of plaintiff.

4. *Admits* that he has paid on said subscription the sum of $275.

5. *Denies* that he was a party to said Terwilliger chancery suit, and had no notice of the application for the assessment.

6. *That* prior to the commencement of this action, all questions then involved were finally adjudicated in the United States Circuit Court for the Southern District of Iowa, in the cause of plaintiff and others against W. H. Anderson, this defendant, and others.

7. "For further answer defendant avers that this action was commenced on the 30th day of August, 1888; that plaintiff's alleged cause of action is founded upon an alleged written subscription by defendant to the capital stock of said company, made at Burlington, Iowa, February 6, 1869; that as alleged in plaintiff's petition, the plaintiff company became insolvent and ceased to do or carry on its business, October 7, 1874, and that at the date last mentioned said receiver was appointed; that on or about the 5th day of June, 1872, the then board of directors of said company duly ordered and directed that each holder of the stock of said company pay to said company, on or before the 12th day of July, 1872, all unpaid balances due said corporation company, as provided by the terms of the contract of subscription, and that the secretary of said company notify the said subscribers of said order and demand payment; that said order was then and there duly entered of record on the books of said corporation company."

8. That the receiver has been restrained from prosecuting this action.

9. That the alleged claim of plaintiff is stale, fraudulent and unjust.

The Evidence at the Trial.

The case was tried before the court without a jury on March 4, 1890.

The plaintiff introduced in evidence [Abstract 12] the

original contract of the defendant, for fifty shares of the plaintiff's stock, which, for convenience, is not copied again into the record, but is like Exhibit "A" attached to plaintiff's petition and shown on Abstract, page 4.

Also [Abst. 12] a verified copy of the original decree of assessment of July 10, 1886, of the Illinois court. The original copy offered being omitted from the record, it being like the copy annexed to the plaintiff's petition. [Abst. 4 to 9.]

Also the demand of the receiver upon the defendant for payment of the amount called for by the decree. This demand [Abst. 13] was for $437.50, and was served by copy upon defendant Purdy, August 29, 1888, calling for payment at once. Counsel for defendant admitted the service of demand, and made no objection to proof of signature or manner of service. [Abst. 14.]

Also the opinion of the Supreme Court of Illinois in the *Terwilliger* case, reported in 59 Ill. 249.

Also a copy of the decree of the Circuit Court of Cook county, Illinois, made and entered in the same case, on November 16, 1872. [Abst. 14–18.]

Also a copy of another order. [Abst. 18.]

Also the testimony of one D. P. Stubbs (Abst. 18), who testified that Purdy had taken a certificate from the company in 1873, under the decision of the Supreme Court in 59 Ill. 249, and the decree of November 16, 1872, for 27½ shares, representing the $275 paid by him. Stubbs also testified that defendant Purdy was a party to the Terwilliger chancery suit.

The copies of the decree of assessment and the other decrees introduced as evidence were substantially admitted to be offered in proper form and to be correct copies of the originals, for no objections upon such grounds were interposed.

In fact the only objection to the copy of the decree of assessment, was the general and insufficient one of "incompetent, irrelevant, and immaterial, and afterward the *special* one which precluded all others, which "was for the further reason that it appears on the face of the decree that this de-

fendant was not a party thereto." [Abst. 56.] The same general objection was offered to the introduction of the decree of November 16, 1872, and January 28, 1873, and the special objection "said decrees having been made fourteen years prior to the alleged decree of assessment." [Abst. 56.]

In *Noonan* v. *Mining Co.*, 121 U. S. 400, this court said: 'Immaterial, irrelevant and incompetent, is too general an objection, where the authentication of the paper is alleged to have been defective. Objection should be so specific as to give the opposite party an opportunity to obviate them at the time, if, under any circumstances, it can be done."

In *Rindskopff Bros. & Co.* v. *Malone*, 9 Iowa 542, the court held that a general objection could not question "the technical sufficiency or competency of the particular instrument relied upon."

In *White* v. *Smith*, 54 Iowa 233, 236, the court held that the question of the "*competency*" of a witness could not be raised by an objection to his testimony as "incompetent, immaterial and irrelevant." Nor does such objection raise the question as to whether the evidence offered is the best evidence. [*Iowa Homestead Co.* v. *Duncombe*, 51 Iowa 525.]

In the *Duncombe* case, 51 Iowa, the court said [528]: "The objection was 'to the contract as incompetent, irrelevant and immaterial,' not that the contract could be proved by parol. If the objection had been distinctly placed upon this ground, probably the defendant would have accounted for the absence of the original writing, and would have rendered parol evidence of its contents proper." Further, error in admitting testimony can not be complained of, if introduced without objection. [*State* v. *Smith*, 46 Ia. 670; *State* v. *Hamilton*, 32 Ia. 572.]

It therefore appears that no proper objection was made to the introduction of any of the records, or papers, and, not being contradicted, their contents stood admitted, for the purposes of the trial, and must be so regarded, and consequently the federal questions were not only fairly raised by the pleadings, but also by the plaintiff's evidence.

The decree of assessment and other evidence of the plaintiff was regarded by the court and opposing counsel as properly in evidence, and the opinion of the Supreme Court of Iowa contains free reference to it.

Texas, &c., Ry. Co. v. *Southern Pacific Co.*, 137 U. S. 54–5.

Defendant's Evidence at the Trial

This in no way met the plaintiff's case, nor sustained the averments of his answer. He introduced the articles of association of the company. [Abst. 19.] If material for any purpose he was estopped by his contract of subscription from in any way impeaching the organization of the company. He introduced the original pleadings of the Terwilliger chancery case. [Abst. 23.] But he could not in this collateral action attack in any manner, any of the proceedings in that case.

He introduced a certain contract between Reeve and the company. [Abst. 24, 32.] But that was immaterial to affect his obligations to the company upon his contract of subscription. He introduced a copy of petition of Kellogg and others in the Terwilliger chancery case. [Abst. 32.] But it in no way could affect the assessment decree, or his liability, as it was a mere proceeding in that case, and unimpeachable in this.

He introduced a copy of the supplemental bill filed in the Terwilliger suit before the receiver was appointed, but this was also another immaterial paper for the same reason.

Also a copy of the stipulation for appointment of the receiver, and order of appointment [Abst. 35–6], which was immaterial and objectionable, for the same reason.

He also introduced in evidence a copy of a resolution by the board of directors of the company, found recorded upon its record book of date June 15, 1872, which reads as follows:

"*Resolved:* That it is ordered that all balances unpaid by subscribers for shares of the capital stock of The Great

Western Telegraph Company are hereby declared due and payable at the office of the company, in Chicago, on the 12th day of July next, and that the secretary notify the subscribers of this order and demand payment." No proof was made that any notice of this resolution was ever given to any one, or any demand for payment made under it. The defendant's contract of subscription was to pay in installments as ordered by the board of directors. The so-called resolution was for payment by each stockholder of his whole unpaid balance, which, according to the finding of the decree of assessment, was in every instance not less than 60 per cent, or $15 on each share, while the special limitation clause of the subscription contracts provided that no single assessment should be for more than $10 on each share. The resolution was not, therefore, for payment in installments, as required by the contracts, and was *void*. Besides, no proof was made that the resolution was attempted to be carried out, or that any notice and demand was made as to defendant or any other stockholders, hence no right of action could or did accrue, by reason of the resolution, and it could not set the statute of limitations in motion. The decisions of the Supreme Court of Illinois upon this subject are as follows:

Illinois decisions relating to contracts of subscription to the capital stock of Illinois corporations, payable in installments.

In *Barrett* v. *A. & S. R. R. Co.*, 13 Ill. 513, the court said: "Were the calls legally made? The power to require pay-"ment from the stockholders is, by the charter vested in "the board of directors. No action can be maintained "against a stockholder for an installment on his subscrip-"tion, until the board has directed the call to be made, and "due notice of the amount and the time and place of pay-"ment have been given. The subscribers are in no default "until these prerequisites of the charter have been per-"formed."

In *Spangler* v. *Indiana and Illinois Central Railroad Co.*, 21 Ill. 276, which was an action at law upon a contract of subscription, which read in the words as follows: "We, the undersigned, promise to pay to the Indiana and Illinois Central Railway Company, fifty dollars for each share of capital stock set opposite our names, in such manner and proportion and at such times as the directors of said company may order and direct, without any relief whatever from valuation or appraisement laws."

To the objection that notice of assessment, and time and place of payment had not been given, the court referred to its decision in the *Barret* case [13 Ill.], and said [277]:

"We have decided [*Barret* v. *The Alton and Sangamon R* "*R. Co.*, 13 Ill. R. 504] that where the power to require "payment from subscribers to stock, is vested in a board of "directors, an action will not lie to recover installments "until the board has directed the call to be made, and due "notice of the amount, and the time and place of payment "have been given, the subscribers being in no default until "these requirements of the charter have been performed.

"The undertaking of the defendant is, to pay to the com- "pany fifty dollars for each share of capital stock subscribed, "in such manner and proportion, and at such times, as the "directors of the company may order and direct."

The court also referred to the fact that the assessment was for the *full* amount of the defendant's subscription, and not for a *portion* or *installment* thereof, and further said:

"The contract must have been understood by both parties to "be, that the board of directors would make, *periodically*, cer- "tain assessments on the stock subscribed, of which the sub- "scribers would be duly notified. It could not have been in "the contemplation of the defendant, or any subscriber that "he could be called upon to pay the whole amount of his "subscription at one time, without notice of previous assess- "ments. This contract, like all others, must be construed "according to the intention of the parties as manifested by "the language used and the object contemplated. By "this contract the defendant was to pay his subscription in

"certain proportions. A call upon him for the whole at "once, is not justified by the contract. A demand for the "whole might be justified if there had been regular period- "ical assessments, and the defendant duly notified of them. "On failiing to pay them, an action would lie for the "whole amount. It is *indispensable* that assessments should "have been made, by an order of the board of directors, and "the subscribers duly notified. * * * He can not be re- "quired to pay the whole amount of his subscription until its "several proportions have been called for and refused."

In *Wear* v. *Jacksonville & Savannah Railroad Co.*, 24 Ill. 596, where the payment of the subscription, by the terms of the contract depended upon call duly made, the court said:

"In this case the times when, and the amounts in which, "this subscription was to be paid, depened upon the action "of the payees, * * * and they should have given notice "to the appellant. *Spangler* v. *Indiana & Illinois Central* "*Railroad Company*, 21 Ill. 277; *Barrett* v. *A. & S. R. Co.*, "13 Ill. 504. For the want of evidence of notice of the calls "in conformity to any rules adopted by the road or otherwise "the verdict and judgment were not warranted, and were "therefore erroneous."

To the same effect is *Stone* v. *Great Western Oil Co.*, 41 Ill. 95–6.

In *Cole* v. *Joliet Opera House Co.*, 79 Ill. 96, 98, the subscription contained the clause that persons subscribing for stock should pay $100 for each share taken, in installments of not more than twenty per cent, as the work progressed, and within twenty days after notice of call, by properly authorized agents, for the purpose of erecting the opera house.

The proof failed to show that notice of the calls had been given; and the court said as to the accruing of the right of action: "All parties seem to concede that appellant was "not bound to pay until he had twenty days' notice that "the several calls had been made: * * * and appel- "lant being entitled by his contract to twenty days' notice "before he could be called upon for payment, appellee "should have proved that the notice had been given for at

"least that length of time. * * * For the want of the "necessary proof of notice in time the court below should "have granted a new trial."

And to the same effect is *Great Western Telegraph Company* v. *Gray*, 122 Ill. 630, as heretofore shown.

The proofs went far short of showing that a cause of action accrued upon the resolution of June 15, 1872, or that it was available in support of a defense of the statute. Defendant also introduced [Abst. 38–9] in evidence a transcript of a *portion* of a certain record in the Circuit Court of the United States for the Southern District of Iowa, in a suit wherein one Counselman et al. were complainants, and W. H. Anderson, Purdy and others were defendants, being the same set out in the 6th paragraph of the defendant's answer herein. The avowed object of this was to show that the company had been defeated previously in a proceeding against defendant Purdy upon his subscription.

The plaintiffs to this proceeding at its commencement, were ostensibly Counselman, McClellan and *Bowen*, the *receiver* of the company; but on rebuttal [Abst. 40] the plaintiff introduced in evidence a copy of an order in the same case, made September 4, 1882, only a few days after it was commenced, dismissing the action so far as the same related to Bowen, the receiver, so that the plaintiff was in no way involved in that proceeding, and Mr. Sutherland testified [Abst. 40] that Mr. Bowen was not authorized to appear in that case, and that his name was introduced into it without his knowledge or consent, and without any application to him for the purpose, and that afterward the case was dismissed as to him. This transcript of the Counselman case, therefore, did not conclude the plaintiff and offered no defense, and was immaterial.

Defendant, Purdy, and one Stubbs, also testified for defendant; but Purdy's testimony was only to the effect that he had no notice of the assessment proceedings in the Terwilliger chancery suit, though he admitted he was a party, but did not know whether his attorney, Van Buren, had notice or not. Stubbs' testimony was to the effect that he

and Purdy were made parties to the Terwilliger suit upon petition filed by them for the purpose. The testimony of neither of them was material as a defense.

Such was the record of the trial. The plaintiff proved the assessment by a decree of a competent court in Illinois, with full jurisdiction and proper parties; that defendant was a stockholder with an unpaid balance on his shares to an amount in excess of that called for by the decree; a demand and refusal and a consequent liability and right to recover judgment against the defendant.

The defendant offered nothing material in response. There was not a single averment of his answer that he made any real endeavor to support.

The defendant's plea of the statute of limitations, excepting the special unsustained averment as to the resolution of June 15, 1872, was as follows:

"That plaintiff's alleged cause of action, if any, accrued "more than ten years prior to the commencement of this "action; that plaintiff's alleged cause of action, if any, is "barred by the statute of limitations."

Upon this record the District Court [Abst. 43] found the issues for the defendant, and entered judgment for defendant and against plaintiff for costs of suit, to which plaintiff duly excepted.

The Supreme Court of Iowa affirmed this decision, and rendered judgment against the plaintiff, the opinion of the court and judgment being found on Abstract, pages 90 to 93.

The reason of the judgment of the District Court does not appear, but it may be presumed from the affirmance of the Supreme Court, that it was the same which inspired the higher court.

Errors Relied Upon.

The error relied upon before this court is the rendering of said judgment by the Supreme Court of Iowa, which it is claimed was in violation of Section 1, of Article IV of the Constitution of the United States, which provides that "full

faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And it is claimed that this right, title, privilege or immunity under such constitution, to which the plaintiff was entitled in the Iowa court, was lawfully and specially set up and claimed in this case both in the District Court of *Des Moines* County, and in said Supreme Court; and that such decision was against such right, title, privilege or immunity.

That in the spirit of section 709 the right, title, privilege or immunity was involved in the pleadings, and fully placed before the District and Supreme Courts of Iowa, and that the decision of the Supreme Court could not have been rendered without a denial of *full faith and credit* to the Illinois decree, and to which it was entitled.

That the Statute of Limitations of Iowa was not available as a defense, nor in any manner sustained in this case, and that the decision to that effect by the Supreme Court of Iowa was colorable merely, and rested upon no proper or broad basis, and could not have been, and was not, rendered, except by an absolute disregard of the decree of the Illinois court, and the faith and credit to which it was entitled.

This is the substance of the errors assigned in the District and Supreme Courts of Iowa, and also in this court. [Abstract 100 to 103.]

Argument.

I.

THE QUESTION OF FULL FAITH AND CREDIT WAS FAIRLY SET OUT, AND INVOLVED IN THE PLEADINGS AND DECISION OF THE SUPREME COURT, AS WELL AS IN THE DISTRICT COURT OF IOWA.

The foregoing "*Statement*" of the case shows this to be true.

In *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 579, this court said:

"But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which, alone, the auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege, protected by the Constitution of the United States, has been withheld or denied by the judgment below."

If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State court could not have given judgment without deciding it, that will be sufficient.

Powell v. *Brunswick County*, 150 U. S. 440.

"A definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision."

Sayward v. *Denny*, 158 U. S. 184.

The record should show that the Federal question must necessarily have been considered and decided, and *what* Federal question.

Maxwell v. *Newbold et al.*, 18 How. 516.

"That its decision (the Federal question) *was necessary* to the judgment or decree rendered in the case * * * and, if it (the Federal question) was erroneously decided * * * then this court must further inquire whether there is *any other* matter or issue adjudged by the statement which is *sufficiently broad* to maintain the judgment of tha court, notwithstanding the error in deciding the issue raised by the Federal question."

Murdock v. *Memphis*, 20 Wall. 590, 636.

"To give us jurisdiction, it must appear that such a question [Federal question] was, in fact, decided, or that its

decision was *necessarily* involved in the judgment or decree as rendered."

Balling v. *Lersner*, 1 Otto. 594, 595.

"3d. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced judgment."

Crowell v. *Randall*, 10 Pet. 398.

It may be shown: "first, either by express averment, *or* by necessary intendment in the pleadings in the case," or "it must appear from the record that the question was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which they passed, without deciding it."

Armstrong v. *Treas. of Athens County*, 16 Pet. 285.

"But it is insisted in addition that the state court did not give due effect to the decrees of the courts of New Mexico and Arizona, and of the State of Texas, and that a title or right claimed under an authority exercised under the United States, as well as under the constitution of the United States, was thereby denied."

Texas & C. Ry. Co. v. *Southern Pacific Co.*, 137 U. S. 48, 54.

"Notwithstanding the inhibition of the constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear af-

firmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State court. *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Armstrong* v. *Athens County*, 16 Pet. 281; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake Co.* v. *Yuba County*, 116 U. S. 410."

Kaukauna Co. v. *Green Bay, &c., Canal*, 142 U. S. 254-269.

II.

THE FEDERAL QUESTION WAS ERRONEOUSLY DECIDED, AND THE DECISION OF THE SUPREME COURT OF IOWA, RESTS UPON NO GROUND BROAD ENOUGH TO SUSTAIN ITS JUDGMENT INDEPENDENT OF ITS DECISION OF THE FEDERAL QUESTION.

The opinion of the court admits the contract of defendant and the appointment of the receiver; and the making of the decree of assessment by the Illinois court, in a proceeding in which the company was a defendant.

In the process of arriving at its conclusion, the court makes a misstatement as to, and denies the existence of, a fact, apparent upon the face of the decree, among the names constituting the parties complaint, and where the defendant's name is found, *and declares*, that the defendant was not a party to the chancery suit, wherein the decree of assessment was rendered. And while, too, it is contradicted by the admissions of the defendant in the pleadings and evidence, and by other testimony. It admits that no right of action accrued in favor of the company by the mere resolution of 1872, and finally concludes:

"If counsel's position be correct, no demand for payment was made for fourteen years or more. Surely the law will not permit a party by his own inaction to defeat the statute of limitations."

The court admits that the statute "does not commence to run until an action can be brought." The opinion then

holds that the corporation could have begun an action at any time against the defendant. This was in contradiction of the record, which shows that the company had been in the hands of the receiver since 1874, during which time no statute could run, by reason of sleeping upon rights, for no charge of *laches* can be imputed to the Illinois court.

The court then cites authorities to show that the company could have brought an action upon the contract, without ordering payment and giving notice thereof. This is against the settled law of the courts of Illinois, as shown, and the opinion rests upon the assumption that the relations between the plaintiff corporation and its stockholders should be controlled by the decisions of *Iowa* courts, in actions brought in Iowa. But the cases cited by the court relate to actions by creditors direct against stockholders, and not where the payment of the debts is sought through the corporation; and the two classes of cases are thus clearly distinguishable.

As an illustration of the character of the cases cited in the opinion, take the case of *Bank* v. *Greene*, 64 Ia. 45, an action by a creditor against a stockholder. Outside of this case there are none of them in which a corporation is plaintiff. The decision of the court is also in direct antagonism to its own previous decision in *Chandler* v. *Keith*, 42 Iowa 99, which related to a receiver's right to recover against an Iowa stockholder, upon a decree of assessment of an Illinois court.

It must not be overlooked that the opinion of the Supreme Court of Iowa, in the present case, does not reject the decree of July 10, 1886, on the ground of defects in the decree, for that was impossible. The decision in the *Chandler–Keith* case shows that the decree in this case, as creating a cause of action, was not open to any objection, even if measured by the Chandler–Keith opinion. Said the court in the last mentioned case, as follows:

"By the terms of the contract, this balance was 'subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular

meeting.' It is not claimed that the directors have acted in the premises or made any call or assessment upon the shares of the stockholders, above the twenty per cent payable by the terms of the obligation, but the plaintiff alleges the bankruptcy of the corporation, and bases his right to recover upon the decree of the Superior Court of Cook County, Illinois.

"Upon examination of this decree, we do not find that any adjudication was made of the amount of the indebtedness of the corporation, so as to show what per cent upon the shares of its stockholders was necessary to pay off such indebtedness, nor does it make or confer authority upon the receiver to make an assessment, or call upon the stockholders for a per centum, found and ascertained to be necessary to pay the debts of the corporation.

The defendant can be required to pay the unpaid balance of his stock, *only* in conformity with his contract. He agreed to pay as called upon to do so by the directors as they should be instructed by a majority of the stockholders present. The court, in the event of insolvency, and the neglect and refusal of the directors and stockholders to act in the premises, can do no more, has no greater authority, to compel payment of this eighty per cent unpaid upon the shares of stockholders, than had the directors; and before the defendant can be required to pay more than the twenty per cent specified in his obligation, a call must be made upon the stockholders for the amount assessed upon the shares held by them respectively. *Warner* v. *Beem*, 36 Iowa 385. And this call should be preceded by the fact that losses have been sustained by the corporation, showing a necessity for an assessment and call upon the stockholders. *The Am. Ins. Co.* v. *Schmidt*, 19 Iowa 502. *This fact must be shown by proper averments in the petition.*"

In this opinion of the court, it also cites with approval the case of *Chandler* v. *Siddle*, then just previously decided by Mr. Justice Miller, in the United States Circuit Court, for the District of Iowa, and which is reported in 3 Dillon

C. C. R., 477, 480, where identically the same position was taken by that eminent judge.

Paragraph III of the opinion of the Iowa court in this case denies again that the defendant was a party in the Illinois chancery case.

There is but really *one* point in the whole opinion. The Iowa court gave judgment against the plaintiff, and applied the statute of limitations of Iowa, of ten years, as a bar to the plaintiff's action, because the board of directors — the defendants own agents — had not made a valid call or commenced an action against the defendant, for ten years before this action was begun. This is the sole ground of the decision, and the court could only have arrived at such a decision by holding that the decree of assessment of the Illinois court coupled with the demand of the receiver for payment, made in pursuance of the decree, could not, and did not, create a cause of action. It was clearly only colorable and no proper ground on which to defeat the plaintiff and ignore the Federal question, or decide it adversely to the claim of the plaintiff.

The decree of the Illinois court which had jurisdiction of the subject-matter and of the parties, was, and is, conclusive upon the merits of the controversies, determined by that judgment between the parties and their privies, in every court in the United States, and can not be collaterally questioned. *Chritmas* v. *Russell*, 5 Wall 290; *Maxwell* v. *Stewart*, 22 Wall. 77; *Anderson* v. *Anderson*, 8 Ohio 168; *Mason* v. *Messenger*, 17 Iowa 261; *Smith* v. *Smith*, 22 Iowa 516; *Ry. Co.* v *Hall*, 37 Iowa 620.

All the stockholders of the plaintiff company of Illinois are integral parts of it, whether they personally reside in Illinois or Iowa or in any other State.

Hawkins v. *Glenn*, 131 U. S. 329.
Sanger v. *Upton*, 91 U. S. 58-9.

All of the subscriptions to the plaintiff's stock are presumably upon the same basis, and with equal liability. The decree of assessment of the Illinois court is conclusive in

every court, in an action against a stockholder of every defence except the one that he has paid the par value. In settling the question of the power of the court to make the decree, involved in its rendering, that decree determines that there has been no previous *laches* on the part of the company or the court.

Lamb v. *Lamb*, 6 Bissell 424.
Glenn v. *Spring*, 26 Fed. Rep. 494.
Lehmann, Durr & Co. v. *Glenn*, 87 Ala. 626.
Great Western Tel. Co. v. *Gray*, 122 Ill. 630.
Glenn v. *Williams*, 60 Md. 93.
Stewart v. *Lay*, 45 Ia. 612.
Schoonover v. *Hinckley*, 48 Ia. 85.

The statute of limitations of Illinois, for the purposes of this case, will be presumed to be ten years, and no action in Illinois would be barred within ten years from the time of demand under it, and subsequent to the date when it was rendered, viz., July 10, 1886.

In *Hawkins* v. *Glenn*, 131 U. S. 332, it was sought to interpose the bar of the statute of limitations to the decree of assessment of the court, because the *officers* had not sought to collect the unpaid balances on the subscriptions earlier; but the court justly said:

"And as between the stockholder and the corporation, it "does not lie in the mouth of the stockholder to say, in re- "sponse to the attempt to collect his subscription for the "payment of creditors, that the claim is barred, because "the company did not discharge its corporate duty in re- "spect to its creditors earlier. [*County of Morgan* v. *Allen* "103 U. S. 498.]"

The defendant was bound by this decree of the Illinois court and could not in this action avail of any defense which reached back of the decree itself.

In *Hawkins* v. *Glenn*, *supra*, the court also said (339): "* * * the defendant * * * contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand

the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

And further said (332): "We think it can not be doubted that a decree against a corporation, in respect to corporate matters, such as the making of an assessment, in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder."

Also: "That the lapse of time *between* the failure of the company, and *the date* of the *decree, did not preclude relief*, by creating a *bar* through statutes of limitation, or the application of the doctrine of *laches*." The court also held, that unpaid subscriptions, due from the stockholders of an insolvent corporation, become impressed with a trust *sub modo*, and "that therefore, statutes of limitation do not commence to run in respect to them, until the retention of the money has become adverse, by a refusal to pay upon due requisition."

This court also there announced the true rule, "that the statute of limitations could not commence to run until after the call was made [by the court]. The court also quoted liberally from its opinion in *Scovill* v. *Thayer, supra*, to the same effect, and showing that the obligation of the stockholder did not exist until the portion of his unpaid balance, necessary to be paid, for the satisfaction of the debts of the corporation, had been duly ascertained, and order for payment by him made, and notice given.

And in *Glenn* v. *Liggett*, 135 U. S. 533, this court again said: "Statutes of limitations do not commence to run, as against subscriptions to stock, payable as called for, until a call or its equivalent has been had, and subscribers can not object, when an assessment to pay debts has been made, that

the corporate duty in this regard had not been earlier discharged."

The court also said:

"But the president and directors stand for the corporation, and it is alleged in the amended petition, that the *corporation* was a party to the amended bill, and that it was duly served with process in the cause, in accordance with the laws and practice of the State of Virginia. The corporation sufficiently represented the president and directors in their official capacity, in which alone they were to act in making a call; *and it also*, as held in *Hawkins* v. *Glenn*, *sufficiently represented* the *defendant*."

As to the constitutional obligations, requiring respect to the decisions of the courts of the domicile of the corporation, this court said in the Hawkins-Glenn case, as follows:

"We concur in the decision to this effect of the highest tribunal of the State, where the corporation dwelt, in reference to whose laws the stockholders contracted (*Canada Southern Railway* v. *Gebhard*, 109 U. S. 527), and in whose courts the creditors were obliged to seek the remedy accorded. *Barkley* v. *Tallman*, 4 Edw. Ch. 123; *Bank of Virginia* v. *Adams*, 1 Parsons, Select Cases, 534; *Patterson* v. *Lynde*, 112 Ill. 196."

It re-announced the same doctrine in *Glenn* v. *Liggett*, 135 U. S. 544, and the principle is also asserted in a large number of other cases, and may be regarded *as settled*.

This decree of assessment was entitled to be enforced in the courts of Illinois. That it created a cause of action, is adjudicated by the Illinois courts. It was, therefore, entitled to the same faith and credit in this case in the Iowa court. Rev. Stat. of U. S., Sec. 905.

Caldwell v. *Carrington's Heirs*, 9 Pet. 86.
Glenn v. *Williams*, 60 Md. 112, 113.
Brown v. *Parker*, 28 Wis. 24.
Mills v. *Duryee*, 7 Cranch 481.
Christmas v. *Russell*, 5 Wall. 290.
Green v. *Van Buskirk*, 7 Wall. 139.

Warner v. *Jaffray*, 96 N. Y. 248.
Ambler v. *Whipple*, 139 Ill. 322–3.
Stark v. *Ratcliffe*, 111 Ill. 80–1.
Killain v. *Toms*, 38 Wis. 595.
McMillan v. *Lovejoy*, 115 Ill. 501.
Rendleman v. *Rendleman*, 118 Ill. 265–6.

I call attention again to the language of the Supreme Court of Illinois in the Gray case [122 Ill.] as to the accruing of the right of action under this decree of the Illinois court, and as applied to the defense of the statute.

"There is nothing in the point as to the statute of limitations. Although the contract was made in 1868, it was to pay as the directors from time to time might order. The directors neglected to make the order for the payment. A court of equity then might make the order in place of the directors. [*Scovill* v. *Thayer*, 105 U. S. 155; *Glenn* v. *Sexton*, 68 Cal. 353.] The order of assessment or call for payment made by that court, was in 1886. Until then, as we view it, the cause of action did not accrue, and since then there has not been time for any period of limitation to run. *Scovill* v. *Thayer*, *supra*." * * * * *

"The *stockholder* is represented *in his interest*, *as* such, by the *presence* of the corporation. 2 Morawetz on Corp., Sec. 822; *Ward* v. *Farwell*, 97 Ill. 593; *Glenn* v. *Williams*, 60 Md. 93; *Sanger* v. *Upton*, 91 U. S. 56." * * * *

"The defendants' promise was to pay, as the directors from time to time might order. * * * * * The court here did make such order, and *thereupon*, or at least after demand made, *defendant's legal liability, upon his contract*, was *complete* to pay the *remaining amount* of his stock subscription. *There was then a perfect cause of action against him.*"

It is submitted that in any view which may be taken, the statute of limitations of Iowa was not a defense in this action tolerable upon any theory, and that the decision of the Supreme Court of Iowa was merely an exercise of power, with no color of support.

The stockholders resident in *Illinois* are liable in *its* courts

in actions upon this decree; and if those resident in *Iowa* are to thus escape a just responsibility for the payment of the debts of this plaintiff, the law, indeed, furnishes but poor protection to the creditors of corporations. It is submitted that the judgment of the Supreme Court of Iowa be reversed, and also that this court render the proper judgment against the defendant, upon the merits, and which should have been rendered by the District Court of Des Moines County, Iowa, namely, for the amount of the assessment, with interest, from the date of the demand, and also make such other order as may appear to the court proper.

Respectfully submitted,

THOMAS J. SUTHERLAND,
Of Counsel for Plaintiff in Error.

WILLIAM P. BLACK,
Also of Counsel for Plaintiff in Error.

FILED.
DEC 30 1895
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

GREAT WESTERN TELEGRAPH CO., *Plaintiff in Error,*
No. 105. *v.*
HIRAM PURDY, *Defendant in Error.*
} *Error to Supreme Court of Iowa.*

CITATION OF ADDITIONAL AUTHORITY.

To the Chief Justice and Associate Justices of said Court:

In view of the fact that in the briefs of counsel, and in their oral arguments, submitted to the court on the 6th and 9th of the present month, *reference* was liberally made to the decision of the Supreme Court of Wisconsin, in *Great Western Telegraph Company* v. *Burnham*, 79 Wis. 47, it is deemed important to call the immediate attention of this court to the *late* decision of the *same* Wisconsin Supreme Court in the case of *Parker* v. *Stoughton Mill Co.*, wherein the previous decision in the *Burnham* case is discussed and the *present* holding of that court announced. The decision was rendered on *the 22d day of October, 1895*, and is reported in 64 N. W. Rep'r, 751; also in 11 National Corporation Reporter 287.

A copy of this communication will be at once mailed to S. L. Glasgow, counsel for defendant in error.

Chicago, December 28th, 1895.

Respectfully submitted,

THOMAS J. SUTHERLAND,
Counsel for Plaintiff in Error.

WM. P. BLACK, of Counsel.

FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE GREAT WESTERN TELEGRAPH COMPANY,
For the use of ELIAS R. BOWEN, Receiver,
Plaintiff in Error,

vs.

HIRAM PURDY, Defendant in Error.

No. 388.

In Error to the Supreme Court of the State of Iowa.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

ACRES, BLACKMAR & CO., PRINTERS, BURLINGTON, IOWA.

Glasgow

IN THE

Supreme Court of the United States.

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THE GREAT WESTERN TELEGRAPH COMPANY,
For the use of ELIAS R. BOWEN, Receiver,
Plaintiff in Error,

vs.

HIRAM PURDY, Defendant in Error.

No. 388.

In Error to the Supreme Court of the State of Iowa.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This action was commenced by the plaintiff in error in the District Court of Des Moines County, Iowa, August the 30th, 1888, to recover from the defendant an alleged unpaid balance to the amount of four hundred and thirty-seven dollars and fifty cents ($437.50), on subscription to the capital stock of The Great Western Telegraph Company.

Plaintiff in its original petition, filed August 30th, 1888, declared upon an alleged contract of subscription, of date February 16, 1869, and an alleged decree of assessment thereon, made by the Circuit Court of Cook County, Illinois, July 10th, 1886. In said petition, plaintiff averred that a suit was commenced in equity, in the Circuit Court of said Cook County, entitled *Jeremiah Terwilliger et al.* vs. *The Great Western Telegraph Company et al.*, for the appointment of a receiver, etc., and in said cause, Elias R. Bowen was duly appointed receiver of said company, and in the further proceedings in said cause, said receiver was ordered, by said Circuit Court of Cook County, by decree of date July 10th, 1886, to collect an assessment of thirty-five (35) per cent of the par value of each share of the capital stock of said company, subscribed for, amounting, upon the subscription in question, to the sum of four hundred and thirty-seven dollars and fifty cents ($437.50) (R., p. 45).

Upon motion by defendant, for more specific statement, sustained by the trial Court, plaintiff amended his petition, stating as follows:

"That The Great Western Telegraph Company became insolvent and unable to pay its indebtedness about the 7th day of October, 1874, and at or about the same date the said company ceased to carry on its business" (R., p. 46).

Upon demurrer by defendant to said petition as amended, the trial Court held the alleged cause of action barred by the statute of limitations (R., p. 46).

Thereafter, plaintiff pleading over, September 15th, 1889, filed an amended petition and an amendment thereto, January 13th, 1890, basing his alleged cause of action upon an alleged decree of assessment of date July 10th, 1886, made by the said Circuit Court of Cook County, and averred as follows: That in the construction of telegraph lines said company became greatly involved and indebted, and in 1874 it had exhausted its assets then on hand, and became insolvent and unable to pay its indebtedness and suspended business; that creditors brought suits against the company and recovered sundry judgments in the sum of more than two hundred thousand ($200,000.00) dollars; that a certain suit was commenced on or about the 19th day of November, 1869, in the Circuit Court of Cook County, Illinois, in Chancery, wherein Jeremiah Terwilliger *et al.*, including Hiram Purdy, this defendant, were complainants and this plaintiff *et al.* were defendants, and that said suit has been ever since and is now pending and undetermined in said Court; that on the 7th day of October, 1874, the receiver for said company was appointed in said suit, for alleged mismanagement, as averred in the *supplemental bill* in said Terwilliger cause, and that on the 10th day of July, 1886, the decree of assessment in question was made in said suit; that defendant was a party complainant in said suit and was fully advised of said proceeding and decree of assessment, and bound thereby (R., pp. 1–3–11–46).

On the 1st day of November, 1889, and on the 1st day of March, 1890, defendant filed his answers to plaintiff's amended petition and amendment thereto, stating as follows:

1st. Defendant denies the alleged indebtedness to plaintiff; denies that the suit of Jeremiah Terwilliger *et al.* vs plaintiff *et al.*, defendants, is now pending and undetermined in the Circuit Court of said Cook County; denies that said suit was pending and undetermined at the date of the appointment of a receiver for said company, October 7th, 1874; denies that the receiver for said company was appointed in said suit; denies that said suit was pending and undetermined at that time.

Denies that the alleged order of assessment was made in said cause, and denies that said cause was pending and undetermined at the time of said alleged assessment, to-wit: July 10th, 1886.

Denies that defendant was in any manner a party to the action or cause in which the alleged decree of assessment was made; denies that he had any notice or information at the time of said alleged assessment, or prior thereto; that any such proceedings were pending or had.

Denies that all or any of the proceedings referred to in plaintiff's petition and amendments thereto were had in the case of Terwilliger, Hiram Purdy *et al.* vs. said company *et al.*, in said Circuit Court

of Cook County; denies that said cause was pending at the time or dates that said alleged proceedings were had; denies that the alleged supplemental bill and cross-bill were filed in said cause.

Denies that defendant paid two hundred and fifty ($250.00) dollars, or any sum whatever, under alleged assessment of October 16th, 1879; denies that said Terwilliger cause was pending at that date.

Denies that at the date of the alleged subscription, of date February 16th, 1869, said company owned or had any capital stock subject to subscription, or that could be legally issued, if subscribed for.

Denies each and every allegation contained in plaintiff's petition and amendment thereto.

2d. Defendant admits he signed the instrument in writing, purporting to be a subscription to the capital stock of said company, being "Exhibit A," referred to in plaintiff's petition. And avers that said company was organized on or about the 2d day of December, 1867, in the State of Illinois, under the law in force at that time, in said State, known as the "Act of 1849."

That at the time of the organization of said company, all of the capital stock thereof, was subscribed for and taken by the incorporators thereof. That at the date of the subscription in question, by the defendant, February 16, 1869, said company had no capital stock subject to subscription, or which could

be legally issued to subscribers therefor, at that date; that defendant had no knowledge of this fact at the date of his alleged subscription.

3d. That on March the 25th, 1868, said company, by written contract with one Selah Reeve, one of the incorporators of said company, and holding one hundred and seventeen thousand eight hundred and ninety-seven shares of the capital stock of said company, agreed to issue and deliver to the said Reeve certificates for one hundred and twenty thousand shares of the capital stock of said company, in consideration of the construction of two thousand miles of line, etc.

That said contract was fraudulently made. At the same date the said Reeve assigned to one Josiah Snow, an incorporator and the then Secretary and Treasurer of said company, one hundred and seventeen thousand eight hundred and ninety-seven shares of the capital stock of said company, in trust, to the said Snow, to sell the same at the rate of ten ($10.00) dollars per share, and pay over the proceeds to the said Reeve. That said Snow called upon this defendant, and represented to defendant that he was the agent of said company, to take subscriptions for the capital stock of said company, and defendant, relying upon such representations, and believing the same to be true, subscribed for fifty shares of said stock, February 16th, 1869, at the city of Burlington, State of Iowa. That such representations

were false, fraudulent and untrue, and the stock so subscribed for was part of the stock theretofore subscribed for, and then owned and held by the said Reeve. That no liability exists against this defendant on account of said subscription. That said subscription to the capital stock of the said company by the said Reeve, has been adjudged fraudulent and set aside by the Supreme Court of the State of Illinois in said cause of Terwilliger *et al.* vs. said company *et al.*, 59 Illinois, pages 249–260, inclusive.

4th. That the subscription to said capital stock of said company, by Selah Reeve, Josiah Snow, David A. Gage and other associates, and the sale of the stock of Reeve to defendant and others, and the said contracts of March 25th, 1868, were fraudulent, and have been so declared by the Supreme Court of Illinois and set aside by said Court in said cause, as found in said 59 Illinois report. Said judgment was rendered by said Court in the said case of Terwilliger *et al.* vs. said company, Selah Reeve *et al.*, this defendant being a party complainant in said action. It was then and there decreed by said Court, that said company issue certificates of stock to all subscribers who have paid money, for as many shares as they were entitled to for the money paid, reckoning forty per cent. paid upon twenty-five ($25.00) dollars, as giving title to a share. Said decree of said Supreme Court was duly rendered at the September Term thereof, 1871. The defendant had

paid upon the subscription in question two hundred and seventy-five ($275.00) dollars. That for said sum, so paid, he was and is entitled, under said decision, to fully paid up shares of said capital stock. That from the month of September, 1871, the shares of capital stock so subscribed for by defendant were and are fully paid up shares, and there is nothing due and unpaid thereon.

That said Circuit Court of Cook County, on *procedendo* from said Supreme Court of Illinois, on the 16th day of November, 1872, rendered a final decree in said suit and for costs against the defendants and awarded execution thereon. Execution was duly issued against defendants for said costs and the same were paid by defendants January the 7th, 1873. That at the date last mentioned, said cause was finally determined and disposed of, so far as the rights of complainants, including this defendant, Hiram Purdy, were concerned (R., p. 15).

That all questions, matters and things involved in this action were fully and finally adjudicated by said final decree, rendered in said Terwilliger cause.

That said company was fully re-organized on or about the month of February, 1873, pursuant to said final decree, of date November 16th, 1872, and the new organization then and there took possession of the property of said company and its affairs.

5th. Defendant avers that said cause of Terwilliger, Hiram Purdy, *et al.* vs. said company,

et al., was finally determined by the Circuit Court of Cook County, on remand from the Supreme Court of Illinois, on the 16th day of November, 1872. That at the date last above mentioned, a final decree was rendered in said cause and for costs against the defendants in said action. That said costs were paid upon execution, by defendants, January the 7th, 1873. That at the date above mentioned, November 16th, 1872, said cause was finally determined and disposed of, so far as the rights of complainant's, including this defendant, were concerned.

That no receiver for said company was appointed at any time in said cause, and no receiver was appointed by the Court in said cause at or before the final disposition thereof, as aforesaid.

That the alleged supplemental bill by J. M. W. Jones *et al.*, was not filed until September the 19th, 1874, nearly two years after the final disposition and termination of said cause of Terwilliger, Purdy, *et al.*, vs. said company, *et al.*

That on the 7th day of October, 1874, an original bill against said company was filed in said Circuit Court of Cook County by one Almon Kidder, asking that the affairs of said company be wound up and for the appointment of a receiver. That on the 7th day of October, 1874, a receiver for said company was appointed by stipulation of certain parties, under said supplemental bill, and said

original bill of said Kidder. Said stipulation being signed by E. A. Small, for John Clark Hilton; Thomas J. Sutherland, for Selah Reeve; Sleeper & Whiton, for Commercial National Bank; Bennett, Kretzinger & Vedder, for complainants, and Harding, McCoy & Pratt, for the said company.

That defendant was not a party to said supplemental bill nor the original bill filed by Almon Kidder, nor to the alleged cross-bill of Selah Reeve. Neither had he at any time notice of any such proceedings. Neither did he appear therein or authorize any one to appear for him.

Defendant avers that he was not a party to the suit or proceedings wherein the alleged appointment of a receiver for said company was made, nor to the suit or proceedings wherein said alleged assessment or assessments were made. Neither had he at any time notice of any such proceeding, and he never, at any time, appeared therein or authorized anyone to appear for him. That the Court in which said proceedings were had, to-wit: The Circuit Court of said Cook County, had no jurisdiction of this defendant and said proceedings were null and void as to this defendant and he is not bound thereby.

Defendant avers that the original order, indorsed by Judge Williams of the said Circuit Court of Cook County, appointing said receiver, in pursuance to said stipulation above mentioned, is entitled in

said "supplemental bill," but as written upon the record it is erroneously and without authority, entitled in the bill and supplemental bill of Terwilliger, *et al.*, and the cross-bill of Selah Reeve. Defendant avers that the title of "Exhibit B," attached to the petition herein, is incorrect, erroneous and without authority in that respect.

That the alleged cross-bill of Selah Reeve vs. said company, *et al.*, mentioned in said "Exhibit B," was not filed in said court until the 21st day of September, 1874. Said cross-bill only asking for an accounting, but for no receiver.

That it is provided by the laws of the state of Illinois, to-wit: By Act of the General Assembly of said state, entitled, an "Act Concerning Corporations," approved April 18th, 1872, and which took effect and became in force July 1st, 1872, as follows:

Sec. 25. "If any corporation or its authorized agent shall do or refrain from doing any act which shall subject it to the forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for payment of money after demand made by the officers, to be returned no property found, or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time or liable in any way for the debts of the corporation by joining the corporation in such suit, and each stockholder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy

his portion of such duties or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders, and courts of equity shall have full power, on good cause shown to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority by the name of the receiver (giving the name) to sue in all courts, and do all things necessary to closing up its affairs, as commanded by the decree of said court."

The said Act took effect and became a law in said state of Illinois, July 1st, 1872, and is now and has been ever since in full force and effect. Said Act was in full force and effect at the time of appointment of the receiver in question, October 7th, 1874, and at the time of the alleged assessment herein, July 10th, 1886, and said proceedings were under said Act and governed thereby. That under said Act, it was, and became necessary to make this defendant a party to said proceedings and each of them, in order to in any way affect or conclude him thereby or to render him liable thereto. This defendant was not a party to said proceedings or either of them, neither appeared therein, nor authorized any one to appear for him and had no knowledge of said proceedings or either of them.

6th. Defendant alleges former adjudication of all matters and questions involved in this action, by final decree rendered by the Circuit Court of the United States for the Southern District of Iowa, Central Division, October 25th, 1885, in a certain cause then pending in said Court, entitled *Charles*

Counselman, et al., vs. *William H. Anderson*, this defendant, Hiram Purdy, *et al.*, No. 1957, Equity. Said decree was in favor of defendant and he was held not liable upon the subscription in question, to complainants, who were creditors of said company.

7th. For further answer, defendant avers that this action was commenced on the 30th day of August, 1888. That plaintiff's alleged cause of action is founded upon an alleged written subscription, by defendant, to the capital stock of said company, made at Burlington, Iowa, February 16th, 1869. That, as alleged in plaintiff's petition, the plaintiff company became insolvent and ceased to do or carry on its business, October 7th, 1874, and at the date last mentioned, said receiver was appointed.

That on or about the 5th day of June, 1872, the then board of directors of said company duly ordered and directed that each holder of the stock of said company pay to said company on or before the 12th day of July, 1872, all unpaid balances due said corporation company, as provided by the terms of the contract of subscription, and that the secretary of said company notify the said subscribers of said order and demand payment. That said order was then and there duly entered of record on the books of said corporation company.

That plaintiff's alleged cause of action, if any, accrued more than ten years prior to the commence-

ment of this action. That plaintiff's alleged cause of action, if any, is barred by the statute of limitations.

9th. Defendant avers that the alleged claim of plaintiff, is stale, fradulent and unjust (R., pp. 47–48–49–50–51–52–54–55–56).

Plaintiff filed replication, denying every allegation in answers, except as consistent with petition and amendments thereto (R., p. 12).

The Great Western Telegraph Company was organized December 2nd, 1867, by Josiah Snow, Selah Reeve and David A. Gage, under the laws of the State of Illinois, passed February 9th, 1849, and contained in the authorized edition of the Statutes of Illinois, for 1863, page 1175; Cooke & Company's edition, Vol. 2, page 1175; Gross' Statute of Illinois, Vol. 1, page 737, 1818–1869. Said company was organized for the purpose of constructing, owning, etc., certain lines of telegraph. The capital stock of said company was fixed at three million ($3,000,000) dollars, divided into shares of twenty-five ($25.00) dollars each, making, in the aggregate, one hundred and twenty thousand shares. All of said shares were taken and subscribed for at the date of the organization. Selah Reeve subscribing for and taking one hundred and seventeen thousand eight hundred and ninety-seven shares; David A. Gage, one thousand shares, and Josiah Snow one thousand shares. The remaining few shares being taken

by other parties named in the certificate or articles of incorporation (R., pp. 19–20–21–22).

Said law or Act of 1849, provided only for the organization of telegraph companies, and required that the articles of incorporation shall specify the names and places of residence of the share-holders and the number of shares held by each of them respectively.

On the 25th day of March, 1868, said company, in writing, transferred all of its capital stock, to-wit: One hundred and twenty thousand shares, to Selah Reeve, one of the incorporators, in consideration that he would construct two thousand miles of line, etc. Said shares *to be owned and represented by the said Reeve in all meetings of the shareholders*, and on the same day the said Selah Reeve, in writing assigned to Josiah Snow, the then secretary and treasurer of said company, in trust, one hundred seventeen thousand eight hundred ninety-seven shares, originally subscribed for by him, the said Selah Reeve. The said Snow to sell the same to other persons at the rate of ten ($10.00) dollars per share, the proceeds to be paid to Reeve. The next day, March 26th, 1868, a supplemental agreement in writing, was made between the said Reeve and Snow as trustee, and said company, giving the said Snow irrevocable authority, as trustee, to sell the stock, through agents, at ten ($10.00) dollars per share, less a commission of fifty cents allowed to

agents, the proceeds to be paid to Reeve, and said Reeve then agreed to procure the remaining two thousand one hundred and three shares of the capital stock, and transfer the same to the trustee (R., pp. 24–25–26–27–28–29–30–31–32).

The alleged subscription by defendant, for fifty shares of the capital stock was made February 16th, 1869, at the City of Burlington, in the state of Iowa, the place of his residence, and reads as follows:

"Capital, $3,000,000; shares, $25; assessments not to exceed $10 on a share.

"Subscription list for the capital stock of The Great Western Telegraph Company.

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of The Great Western Telegraph Company, placed opposite our respective names and pay for the same 'in installments, to-wit: 'Five per cent on amount paid in', and the balance as the directors from time to time may order; in consideration thereof, The Great Western Telegraph Company agree that when forty per cent of the par value of the shares shall have been paid under such orders and the installment receipts thereof surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full paid stock by the said company.

"T. C. Snow is appointed agent to solicit stock and receive only the first installment of five per cent (fifty cents on a share) at the time of subscription.

"J. Snow, Secretary."

NAMES.	RESIDENCE.	DATE OF SUBSCRIPTION.	NO. OF SHARES.
Hiram Purdy.	Burlington, Iowa.	Feb. 16, 1869.	Fifty (50)

The decree of assessment in question referred to in plaintiff's petition, as "Exhibit B" will be found in the record (pp. 4–5–6–7–8–9).

One Mr. Snow called upon defendant at that time and obtained said subscription, representing that he was the agent of the company, and defendant signed said subscription without any knowledge to the contrary.

The alleged subscription was made more than one year after the organization of the company, at which time all of the capital stock was subscribed for, and nearly one year after all the stock had been transferred to Selah Reeve. The company, at the date of the subscription in question, had no stock which it could legally issue and the stock sold at that time to defendant, was the stock of Selah Reeve, and Josiah Snow was his agent. The subscription, therefore, is void and of no effect, and creates no liability against defendant.

About the latter part of 1869, defendant had paid, upon said subscription, two hundred and seventy-five ($275.00) dollars. He never paid any other money thereon, or any money after that date.

November 16th, 1869, one Jeremiah Terwilliger, a share-holder and subscriber to the capital stock of said company, commenced an action, in equity in the Circuit Court of Cook County, State of Illinois, in behalf of himself and other share-holders and subscribers, (except defendants to the action), who

should come in and be made parties complainant, against The Great Western Telegraph Company, Selah Reeve, Josiah Snow, and David A. Gage, No. 4884, Chancery, asking the Court to set aside and declare as fraudulent, said contracts between the company and Selah Reeve and Josiah Snow, of date March 25th and 26th, 1868, and that certificates for full paid stock be issued, etc., and for general relief (R., pp. 60–61–62).

Some twenty or twenty-five share-holders and subscribers to said capital stock joined with Terwilliger as party complainants in said suit, including this defendant, Hiram Purdy. Said suit was tried in the said Circuit Court at the March term, 1871, and the relief asked being refused in part, said complainants appealed to the Supreme Court of the State of Illinois. Said Supreme Court, at the September term, 1871, reversed the decree of the Court below and declared said contracts, and subscriptions by defendants, fraudulent and set the same aside and directed the officers of the company to issue certificates of stock to those who had actually paid money, and directed a meeting of such stockholders to elect a new board of directors. The opinion of said Supreme Court was duly introduced in evidence but was not copied at length in the record, and we respectfully ask the Court to refer to said report for said opinion (see 59 Illinois, 249–260).

The Supreme Court of Illinois in the opinion unhesitatingly and rightfully declared the whole scheme of the organization of said company a fraud and the stock taken by said original incorporators, sham and fictitious, and that the whole scheme including the contracts with Reeve and Snow, wears the same fraudulant colors throughout its entire history. Selah Reeve who professed to hold nearly all the capital stock, was at the time of the organization of the company insolvent, and a few months thereafter filed his petition in bankruptcy and received his discharge as a bankrupt. (*Terwilliger* vs. *Great Western Telegraph Company*, 59 Illinois, 251–259, inclusive). "The Supreme Court therefore decided that the only real stockholders of the company were those who had paid their money (see page 258 of the opinion in said 59 Illinois).

On page 260 the Court said:

"As we have already remarked, the actual stock of this company and the lines which have been constructed, belong to the persons by whose money the work was done. They are entitled to such protection as the Courts can give them."

On remand the said Circuit Court of Cook County duly entered a final decree in said cause, so far as complainants therein, including defendant, were concerned, November 16th, 1872. By said decree at said date, said cause was finally determined, so far as the rights of the defendant in the case at bar, were concerned, and judgment rendered against

defendants, in said Terwilliger suit for costs, which were duly paid by defendants, on execution, January 7th, 1873 (R., pp. 15–16–17).

The only thing remaining to be done in the case, pursuant to said decree, was a meeting of the stock-holders, therein provided for, and an accounting between Selah Reeve and the company, co-respondents in the Terwilliger suit.

January 28th, 29th and 30th, 1873, said meeting of said stock-holders was duly held and a new organization of the company effected, as provided in said decree (R., pp. 85–86).

And pursuant to said decree a certificate of stock for twenty-seven and one-half shares was issued to defendant January 29th, 1873, (R., p. 19).

At this date the decree was fully performed and defendant had no connection with the cause thereafter.

March 5th, 1873, The Great Western Telegraph Company, A. C. Kellogg and W. B. Harford as complainants, filed a petition in said Circuit Court of Cook County, entitled in said Terwilliger cause, and referring to said decree, alleged that a new board of directors had been elected and that an amicable settlement could not be made with Selah Reeve, and asked for an accounting with the said Reeve, etc. Said petition was duly referred to a Master in Chancery, March 8th, 1873 (R., pp. 64–65–66–67).

Defendant was in no way or manner a party to this proceeding. Said Terwilliger cause having been determined as to him, November 16th, 1872.

September 19th, 1874, a certain pleading called a "supplemental bill" was filed in said Circuit Court of Cook County, entitled in said Terwilliger cause, wherein J. M. W. Jones, John I. Bennett, Anthony W. Street and Alexander Street were complainants against Joshua Stark, Abel H. Bliss, B. F. Allen and Orville D. Bond, impleaded with The Great Western Telegraph Company, respondents. These complainants set forth in said supplemental bill, mismanagement, misfeasance, malfeasance and fraud on the part of the then officers of said company, and asking for the appointment of a receiver. Said respondents, Joshua Stark being then president, O. D. Bond, secretary, and Abel H. Bliss, general manager of said company (R., pp. 69–70–71).

This is the "supplemental bill" mentioned in plaintiff's amendment to his petition, filed January the 13th, 1890, wherein he avers that a receiver was appointed by said Circuit Court of Cook County, Illinois, on account of alleged mismanagement, as averred in the "supplemental bill" in the Terwilliger cases (R., p. 11).

This intervening or supplemental bill is between new and other parties than those to the original Terwilliger suit, and this defendant was in no way a party thereto. An agreement between parties

thereto for the appointment of a receiver under said "supplemental bill," dated October 5th, 1874, was filed in said Circuit Court of Cook County, October 7th, 1874, and entitled in said Terwilliger cause (R., p. 74).

Defendant was not a party to said agreement. The receiver, Mr. Horton, was appointed under said supplemental bill and said agreement and the present receiver is his successor (R., p. 75).

Mr. Horton was also appointed receiver by the same court in the case of Almon Kidder vs. the said company, October 13th, 1874 (R., pp. 76–77).

Defendant was in no way a party to said suit.

The appointment of a receiver was not made until two years after the final determination of the Terwilliger cause, so far as defendant was concerned; and the intervening or supplemental petition and agreement upon which said receiver was appointed, were between other parties than those to the original Terwilliger suit, and defendant was not a party thereto and had no notice or knowledge thereof, neither did he appear therein, or authorize anyone to appear for him.

The alleged assessment by which appellant seeks to render defendant liable, was made July 10th, 1886, twelve years after the appointment of the receiver and fourteen years after the final determination of the original Terwilliger cause, in which defendant was a party complainant. Defendant

was in no way a party to the proceedings or suit in which said receiver was appointed and in which said decree of assessment was made, and is not bound or concluded thereby. No assessment was asked for in the original Terwilliger suit and the company was a going concern for two years after said suit was finally determined.

The alleged claim and liability sought to be enforced against defendant in this action, were fully adjudicated by the final decree of the Circuit Court of Cook County, Illinois, of date November 16th, 1872, in said Terwilliger suit, against said company, and the receiver being privy thereto, is bound thereby.

The subscriptions to the capital stock of said company by Selah Reeve, Josiah Snow, and David A. Gage, original incorporators, were set aside in that action and certificates of stock ordered issued, to the amount of money actually paid by defendant and others. Defendant having paid two hundred and seventy-five ($275.00) dollars, was entitled, under the order of the Supreme Court of Illinois, to shares of stock to that amount, and no liability exists against defendant on account of said shares.

The alleged cause of action herein, is barred by the statute of limitations of the state of Iowa. The subscription in question, is an Iowa contract, made at Burlington, Iowa, February 16th, 1869, the resi-

dence of defendant. Even if defendant were liable upon the written subscription, more than ten years prior to the commencement of this action have elapsed since the right of action accrued. The liability of a stock-holder to a creditor of a corporation is an implied one, and the action must be brought within five years under the statute of the state of Iowa. Plaintiff avers in his petition that the company became insolvent, exhausted its assets and ceased to carry on its business in October, 1874. The right of action in favor of the creditors against the stock-holders, accrued at that date. The liability of the stock-holder to the creditor of the company became fixed at that date. This action was commenced August 30th, 1888, fourteen years after the right of action accrued.

Further, on the 5th day of June, 1872, the proper officers of said company duly passed and entered of record, certain resolutions, ordering all unpaid balances of stock to be paid on or before the 12th day of July, 1872 (R., p. 84).

The right of action, therefore, accrued under said resolutions in June, 1872, and suit should have been brought thereon within five years thereafter, either by the company or by the receiver, or by the creditors.

By the laws of the state of Illinois, in force and effect from and after July 1st, 1872, it was necessary to make stock-holders a party to the proceed-

ings for the appointment of a receiver and for assessments upon the stock, in order to in any way affect or conclude the stock-holder by such proceeding. The receiver in question was appointed October the 7th, 1874, two years after said law took effect and defendant was in no way made a party to said proceedings. The law in question is pleaded in defendant's answer (R.. p. 55).

Plaintiff is not entitled to anything in this action at the hands of the Court, except that which an unbending or inflexible rule of law will give him.

The trial Court found in favor of defendant and rendered judgment against plaintiff for costs.

The Supreme Court of Iowa affirmed the decision of the trial Court, upon the plea of the statute of limitations, other questions in the case not considered (R., pp. 90–91–92).

ALLEGED ERRORS.

Plaintiff in error contends that the Supreme Court of the state of Iowa, erred in holding and deciding that plaintiff's cause of action was barred by the statute of limitations, thereby refusing to give full faith and credit as evidence to the order of assessment made by the Circuit Court of Cook County, Illinois, in disregard of Sections 1 and 2, Article IV., of the Constitution of the United States, and the law of Congress, passed in pursuance thereto; in

this, that said Court should have held, that said order of assessment was conclusive upon defendant, as to his alleged liability, and that he was precluded thereby, from asserting any defenses to this action.

Sections 1 and 2, Article IV., of the Constitution of the United States, provide as follows:

"Section 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.

"Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 905, Revised Statutes U. S., 1878, provides as follows:

"The records and judicial proceedings of the Courts of any state or territory * * * * shall be admitted in any other court within the United States by the attestation of the Clerk and the seal of the Court, etc. * * * And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every Court within the United States, that they have by law or usage in the Courts of the state from which they were taken."

POINTS.

1. Defendant in error respectfully insists that this court has no jurisdiction of this cause.

The decree or order of assessment in question (R., pp. 5–6–7–8–9) made by the Circuit Court of Cook County, Illinois, is neither a decree, judgment,

nor a judicial proceeding against defendant within the meaning of the Constitution and law of Congress, above cited. The Constitution applies only when the Court has jurisdiction, and a judgment or decree has been rendered in a proceeding to which the defendant was a party individually, and such judgment or decree must be final and not interlocutory. To constitute a valid judicial act or proceeding against defendant, the Court must have had jurisdiction of the defendant personally as well as of the subject matter. The Court did not have jurisdiction over this defendant individually, nor of the subject matter of this action, but had jurisdiction only of the corporation. The order in question is not *res adjudicata* as to the liability of defendant in this action. The liability of defendant, if any, for an unpaid balance on his contract of subscription, is a personal liability, under contract, to the company or creditor, and is not a corporate matter. Jurisdiction of the corporation would confer no jurisdiction over defendant. As to such liability he is not represented by the corporation.

Bennet vs. *Great Western Telegraph Co.*, Illinois Appellate Court Reports, Vol. 53, 276–279–280–281–282;

Ward vs. *Farwell*, 97 Illinois, 616–617.

To give this court jurisdiction of this case, there should exist a valid judgment, or decree rendered against defendant personally, by a court having

jurisdiction of the subject matter of this action. Then the question whether the Courts of Iowa gave full faith and credit to said judgment, or decree, would be a federal question.

Public Works vs. *Columbia College*, 17 Wall., 521–528;
Du Passeur vs. *Rochereau*, 21 Wall., 130–134–135;
Pennoyer vs. *Neff*, 95 U. S., 714;
Embry vs. *Palmer*, 107 U. S., 3–8–9–10;
Crescent Live Stock Company vs. *Butchers' Union*, 120 U. S., 141–142–146–147;
Black on Judgments, Vol. 2, Sec. 867;
Freeman on Judgments, 4th Ed., Vol. 2, Sec's 559–562.

This action is founded upon the contract of subscription in question, to collect a call made thereon, by the order of assessment in question. This order of assessment is nothing more than a call made by the Court instead of by the officers of the company. The order of assessment in question, is not a judgment that would support this action. This action is not founded upon a judgment or decree by a Court of a sister state, within the meaning of the Constitution and laws of the United States.

Glenn vs. *Saxton*, 68 Cal., 353–354–358;
D'Arcy vs. *Ketcham*, 11 How., 165–175–176;
Insurance Company vs. *Harris*, 97 U. S., 331–336;
Am. and Eng. Ency. of Law, Vol. 12, p. 148m;
Black on Judgments, Vol. 2, Sec's 508–509–695;
Freeman on Judgments, 4th Ed., Vol. 2, Sec. 251.

The decision of the Supreme Court of the state of Iowa in this case, was upon a question not of a federal character, and one broad enough to sustain the judgment. The decision of the Supreme Court was upon the construction of a state statue, to-wit: the statute of limitations of the state of Iowa.

Millers' Executors vs. *Swan*, 150 U. S., 132, and authorities there cited.

This Court, under the rule adopted in cases of this character, will regard and follow the decision of the Supreme Court of the state of Iowa, construing the statute of limitations of said state, as conclusive of the case at bar, in this Court.

Balkam vs. *Woodstock Iron Company*, 154 U. S., 177-187, and cases there cited.

2. Section 2, of Article IV., of the Constitution of the United States, has no application to judgments of Courts of sister states.

Du Passeur vs. *Rochereau*, 21 Wall., 134;
Embry vs. *Palmer*, 107 U. S., 9.

3. The order of assessment is not conclusive upon defendant in this action, neither is he precluded nor his pleas or defenses, including the statute of limitations rendered unavailing thereby. To have that effect the judgment or decree must have been rendered by a Court having jurisdiction

over the defendant individually and of the subject matter, and must have been final and not interlocutory. The said Circuit Court of Cook County had no such jurisdiction of defendant, nor of the subject matter of this action. A judgment or judicial proceeding without such jurisdiction is void and entitled to no faith and credit. The question of the jurisdiction of the Circuit Court of Cook County, Illinois, is open to defendant in this action.

Public Works vs. *Columbia College*, 17 Wall., 521–527–528;

Thompson vs. *Whitman*, 18 Wall., 457–469 inclusive;

Knowles vs. *Gas Light & Coke Company*, 19 Wall., 58;

Am. & Eng. Ency. of Law, Vol. 12, page 148m;

Black on Judgments, Vol. 2, Sec. 695.

Defendant was not a party to the proceedings in which said order of assessment was rendered, and cannot be precluded thereby in this action. No persons are concluded by a judgment or decree, except those who are parties to it, and have had an opportunity of presenting their rights.

DuPasseur vs. *Rochereau*, 21 Wall., 135-136;

Pennoyer vs. *Neff*, 95 U. S., 714-726 to 734 inclusive;

St. Clair vs. *Cox*, 106 U. S., 350–353;

Freeman on Judgments, 4th Ed., Vol. 1, Sec. 251.

A judgment rendered against defendant for the amount of the alleged unpaid balance in question

in this action, by the Circuit Court of Cook County, having jurisdiction only of the corporation, would be void and entitled to no faith and credit. The liability of defendant, if any, in this action, is personal and has no relation to corporate matters or functions, and as to such liability he cannot be represented by the corporation.

Ward vs. *Farwell*, 97 Illinois, 616–617;
Bennett vs. *Great Wes. Tel. Co.*, 53 Ills., App. Reports 276–279–280–281–282.

How then, can defendant be estopped in this action by this order of assessment, when he would not be estopped by such judgment?

4. Said Circuit Court of Cook County had jurisdiction of the corporation at the time of the appointment of the receiver, October 7th, 1874, and at the time the order of assessment was made, July 10th, 1886, and this jurisdiction of the company was sufficient to authorize such appointment and the making of said order of assessment. It was not necessary that defendant should have been a party to such proceedings, neither was notice to him thereof, obligatory. Defendant was not a party to such proceedings, neither had he any notice thereof, either personally or by publication. Such order of assessment is not binding upon defendant further than as to the authority of the Court to make the call, having jurisdiction of the corporation. An

order of assessment made by the Court is of no greater force than an assessment made by the officers of the company.

Great Wes. Tel. Co., vs. *Gray*, 122 Ills., 640.

Such order is not in the nature of a judgment against and conclusive upon the stock-holder, as to his liability, in a subsequent action to collect the amount of the call. The Court making the order, could not possibly hear and decide upon all the various defenses, which a numerous body might be justly entitled to present. These defenses can and ought to be heard when actions are brought for the recovery of the amount.

Lamb vs. *Lamb*, 6 Biss., 424.

This Court has held, in *Hawkins* vs. *Glenn*, 131 U. S., 319–329; followed by *Glenn* vs. *Liggett*, 135 U. S., 533–534, and *Glenn* vs. *Marbury*, 145 U. S., 499–507, that a call made by the Court having jurisdiction of the corporation, is binding upon the stock-holder, as to corporate matters or corporate functions, although not a party as an individual. But defendant in error respectfully submits, that this Court does not hold such order to be conclusive upon the stock-holder, nor that he is precluded thereby from making any defense he may have, when action is brought against him personally, to collect the amount of the call. On the contrary, this Court considered and passed upon the defenses pleaded in each of said actions by defendants.

5. Defendant was not a party to the suit or proceedings in which the receiver was appointed, nor in which the order of assessment was made. Said appointment and said order were not made in the original Terwilliger case, to which defendant was a party complainant. November 20, 1869, Jeremiah Terwilliger, this defendant Hiram Purdy, *et al.* share-holders and subscribers, commenced said action in the Circuit Court of Cook County, Illinois, vs. The Great Western Telegraph Company, Josiah Snow, David A. Gage and Selah Reeve, the officers of said company, asking that certificates of stock be issued for money paid, and that the contracts made between the company, Gage, Snow and Selah Reeve be declared fraudulent, void and set aside. Said contracts are those dated March 25th and 26th, 1868 (R., pp. 60–61–24–25–26–27–28–29–30–31–32).

(The date of the verification of said petition by Mr. Terwilliger, on page 61, is a typographical error and should read November 19th, 1869).

Answers were duly filed by said defendants to said bill (R., pp. 61–62).

No order of assessment was asked for in said action.

Said cause was fully and finally determined and disposed of so far as the rights of this defendant, Hiram Purdy were concerned, by final decree of said Circuit Court of Cook County, November 16th, 1872 (R., pp. 14–15–16–17.

The costs of said action were paid by defendants therein, January 7th, 1873 (R., p. 63).

The new organization of the company, pursuant to said decree, was had January 28th, 29th and 30th, 1873 (R., pp. 85–86).

A certificate for twenty-seven and one-half shares of the capital stock was issued to defendant, Hiram Purdy, January 29th, 1873 (R., p. 19).

At this latter date, the said final decree was fully performed, and this defendant was no longer a party to, nor had any interest in the case.

The only thing remaining to be done, pursuant to said decree was an accounting between the co-respondents, the corporation and Selah Reeve, amicable if possible, otherwise action to be brought by the company against its co-defendant, Selah Reeve.

March 5th, 1873, The Great Western Telegraph Company, defendant in the original Terwilliger suit, with A. C. Kellogg and W. B. Harford, commenced an action against its co-defendant, Selah Reeve, in the Circuit Court of Cook County, Illinois, entitled in said Terwilliger suit, for an accounting, etc. (R., pp. 64–65–66–67).

The defendant, Hiram Purdy, was not at any time, or in any manner a party to this proceeding.

September 19th, 1874, J. M. W. Jones, John I. Bennett, Anthony W. Street and Alexander W.

Street, commenced an action in the Circuit Court of Cook County, Illinois, against Joshua Stark, Abel H. Bliss, D. F. Allen, Orville D. Bond and The Great Western Telegraph Company, entitled in said Terwilliger suit, in Chancery, *supplemental bill*, asking for an accounting and the appointing of a receiver for the corporation (R., pp. 69–70–71–72).

The defendant, Hiram Purdy, was not a party to this action or proceeding. This so-called "supplemental bill," although entitled in said Terwilliger case, is between other parties than those to the original Terwilliger suit, and based upon an entirely different state of facts, and asking for other and different relief.

October 7th, 1874, an agreement by the parties to said "supplemental bill" for the appointment of a receiver, was duly filed (R., p. 74).

October 7th, 1874, O. H. Horton was appointed receiver for the corporation, under said "supplemental bill" and said "agreement" (R., p. 75).

Defendant in error was not a party to said agreement nor to said order making said appointment.

Afterward, in the further proceedings, under said "supplemental bill," the order of assessment in question was made, July 10, 1886 (R., pp. 5–6–7–8–9).

The record, in so far as it shows said order of assessment to have been made in the original Terwilliger cause, and entitled in that cause, is incorrect, erroneous and without authority in that

respect (R., p. 5). All that portion included in first bracket on page 5 of the record, with the word "Bill" opposite the center is without authority and erroneous. Further, the words "and has been ever since and is now pending and undetermined in this Court," in eighth and ninth lines from top of page 7 in record, is erroneous and without authority as to this defendant.

The original Terwilliger case was finally disposed of, so far as this defendant was concerned, two years before said "supplemental bill" was filed and before the appointment of the receiver, and fourteen years prior to the order of assessment in question. Further, the original order, endorsed by Judge Williams of said Circuit Court, appointing the receiver in pursuance of the stipulation, is entitled in Chancery, "supplemental bill" (R., p. 75).

Defendant, as the record shows, was not a party to any of these proceedings. He testifies fully to that effect (R., pp. 88–89).

A cause can be finally determined as to some parties thereto, and remain open as to others.

Withenbury vs. *United States*, 5 Wall., 1819;
Williams vs. *Morgan*, 111 U. S., 684;
Hill vs. *R. R. Company*, 140 U. S., 52;
Central Trust Company vs. *Marietta & N. G. Ry. Company*, 48 Fed. Rep., 850;
Grant vs. *R. R. Company*, 50 Fed. Rep., 795;
Standley vs. *Roberts*, 59 Fed. Rep., 839–840, and cases cited.

6. Under the statutes of Illinois, the Circuit Court of that state had no authority to make the order of assessment in question, unless the defendant was a party to the proceedings in which the order of assessment was made. The order of assessment, therefore, is neither binding upon nor conclusive upon defendant (R., p. 55).

Public Laws of Illinois, 1871 and 1872, page 302;
Revised Statutes of Illinois, 1877, Vol. 1, pages 286–287;
Lamar Ins. Co., vs. *Hildreth*, 55 Iowa, 250–251;
Chandler vs. *Brown*, 77 Ills., 333;
Lamar Ins. Company vs. *Gulick*, 102 Ill., 41.

7. There is no evidence in the record showing the effect given to the order, by the law of Illinois. In the case at bar it is necessary for the plaintiff to prove this fact, the same as any other fact in the case. The action of the Iowa Court will be determined solely by the record.

Hanley vs. *Donogue*, 116 U. S., 1;
C. & A. R. R. Company vs. *Wiggins Ferry Company*, 119 U. S., 615–622–624;
Crafts vs. *Clark*, 31 Iowa, 77;
Sayre vs. *Wheeler*, 31 Iowa, 114.

In the absence of such proof the law of Illinois is presumed to be the same as that of the state of Iowa.

Stephens vs. *Williams*, 46 Iowa, 540;
Neese vs. *Farmers' Ins. Company*, 55 Iowa, 604;
Hadley vs. *Gregory*, 57 Iowa, 158.

The law in Iowa, is to the effect, that an order of assessment made by a Court, is not conclusive upon the stock-holder in an action against him, to recover upon an alleged unpaid balance.

Lamar Insurance Company vs. *Hildreth*, 55 Iowa, 251;

See also decision of the Supreme Court of Iowa, in the case at bar (R., pp. 90–91–92).

8. The statute of limitations of the state of Iowa provides as follows:

"2529. The following actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared.

"Par. 4. Those founded on unwritten contracts. Those brought for injuries to property or for relief on the ground of fraud in cases heretofore solely cognizable in a Court of Chancery, and all other actions not otherwise provided for in this respect, within five years.

"Par. 5. Those founded on written contracts. On judgments of any Courts except those Courts provided for in the next sub-division, and those brought for the recovery of real property, within ten years.

"Par. 6. Those founded on a judgment of a Court of Record, whether of this or of any other of the United States, or of the Federal Courts of the United States, within twenty years.

"2533. The time during which a defendant is a non-resident of ~~a~~ the state, shall not be included in computing any of the periods of limitation above described."

Code of Iowa, 1873, Sections 2529–2533;

McClains' Annotated Code of Iowa, 1888, Sections 3734-3738.

The exception is that the time during which a defendant is a non-resident, shall not be included in computing the period of limitations. "The burden of establishing this exception is upon the party who invoked its aid."

Evans vs. *Montgomery*, 50 Iowa, 333.

This exception is not claimed by plaintiff and is not a question in the case. The case just cited is for the purpose of showing to this Court the rule of practice in the state of Iowa.

The action at bar was commenced August 30, 1888. Original notice of such action was served upon the defendant, in Des Moines County, Iowa, at that date, and the petition filed in the office of the Clerk of the District Court of Des Moines County, Iowa, on the same day (R., pp. 86–87).

The demand upon defendant, was made August 29th, 1888 (R., pp. 13–14).

The liability of a stock-holder to a creditor of a corporation is upon an implied or unwritten contract and must be brought within five years from the time the cause of action accrued.

First National Bank of Garrettsville vs. *Greene*, 64 Iowa, 448.

The action at bar is of this nature, for and in behalf of creditors, and in fact, by creditors. If the action were upon the written contract of subscription in question, it would be barred within ten

years from the time the cause of action accrued. The corporation in question, as averred in plaintiff's petition, became insolvent and had exhausted its assets and was unable to pay its indebtedness, and ceased to carry on its business about the 7th day of October, 1874 (R., p. 46).

At that date the liability of the stock-holder to respond to the creditor became fixed. At that date the cause of action accrued. The creditors of the corporation at that time could have proceeded against the stock-holders individually for any unpaid balance, and the company, through its officers, could then have made a call and demand upon the stock-holders for any and all unpaid balance, and in default of the payment of such call, commenced action thereon. If the company can maintain action now twenty years later, it could have done so then. The appointment of a receiver made no difference, and would not stop the statute from running. The receiver in question, if a call were neccessary, should have caused the same to be made within a reasonable time after his appointment. The receiver was appointed October 7th, 1874, and no call was made until July 10th, 1886, twelve years after such appointment.

The Supreme Court of the State of Iowa have construed the Statute of Limitations of said State to the effect, that a party holding a claim or right of action, cannot be allowed to prolong the opera-

tion of the Statute, by refusing or neglecting to take the steps which the law requires, in order to authorize the maintainance of the action. If a demand upon or notice to the defendant be neccessary, prior to the commencement of the action, the plaintiff must make such demand or give such notice and commence the action within the time fixed by the Statute. The right of action will be deemed to have accrued at the time, when, by taking the proper steps, the action might have been brought, and the Statute commences to run, from that time.

The contract of subscription in question is an Iowa contract, made at Burlington, Iowa, February 16th, 1869, and provides for five per cent. on amount paid in, and the balance as the directors from time to time, may order (R., p. 4).

Were a demand or call necessary, such demand or call should have been made within five years or at most within ten years from October, 1874. If a demand be necessary as a preliminary step before an action can be maintained or commenced upon a written contract, the plaintiff cannot wait ten years, then make the demand and have ten years thereafter in which to commence his action. The action at bar would be barred by the Statute in five years, or if upon the contract of subscription, within ten years.

Baker vs. *Johnson County*, 33 Iowa, 151;

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Baker vs. *Johnson County*, 33 Iowa, 151;

Prescott vs. *Gonser*, 34 Iowa, 175;
Hintrager vs. *Hennessy*, 46 Iowa, 600;
Squirer vs. *Park*, 56 Iowa, 407;
Ball vs. *C. & N. W. R. R. Company*, 62 Iowa, 751;
First National Bank of Garrettsville vs. *Green*, 64 Iowa, 445;
Lower vs. *Miller*, 55 Iowa, 408;
Hintrager vs. *Trout*, 69 Iowa, 746.

This Court, in the case of *Hawkins* vs. *Glenn*, 131 U. S., 319, followed in the case of *Glenn* vs. *Liggett*, 135 U. S., 533, held that the Statute of Limitations did not commence to run as against subscriptions to stock, payable as called for, until a call, or its equivalent had been made, the law of Virginia being in question. These cases were commenced in the Circuit Court of the United States and came to this Court on writ of error. The case at bar was commenced in the District Court of the State of Iowa, appealed to the Supreme Court of that State and came to this Court on writ of error. The facts in the case at bar are different from those in the Glenn cases.

Statutes of limitation pertain to the remedy and all actions must be brought within the time prescribed by the *lex fori*.

This action involves the contruction of the statute of limitations of the state of Iowa, and such construction by the Supreme Court of said state, will be regarded and followed by this Court. This

statute, with the decisions of the State Courts thereon, constitute a rule of property within the state, including title to real estate.

Moores vs. *Citizens National Bank*, 104 U. S., 625;
Union Bank of Chicago vs. *Kansas City Bank*, 136 U. S., 223;
Bauserman vs. *Blunt*, 147 U. S., 647;
Millers' Executors vs. *Swan*, 150 U. S., 132;
Marbury vs. *Kentucky Union Land Co.*, 62 Fed. Rep., 335–354–355;
Balkam vs. *Woodstock Iron Co.*, 154 U. S., 187–189.

9. On the 5th day of June, 1872, at a meeting duly held by the proper officers of the corporation, special attention was called to the point of making a final call on all subscribers to the capital stock, and resolutions were passed ordering all balances unpaid by subscribers, due and payable on or before the 12th day of July, 1872, at the office of the company, in Chicago, and that the Secretary notify the subscribers and demand payment, and that the President or Treasurer be authorized to collect by legal means, all such balances due and unpaid, after the 12th day of July, 1872.

These resolutions were duly entered on the record book of the corporation and signed thereon by David A. Gage, President, June 5th, 1872 (R., pp. 84–85).

These resolutions were passed by the officers of the company, in management of the affairs of the company, while the company was a going concern and two years before it ceased to do business, and two years before the appointment of a receiver, in October, 1874. By these resolutions all unpaid balances were made due and payable on the 12th day of July, 1872. The right of action then accrued in favor of the company and against the subscribers. Action should have been brought thereon against the defendant within five years from that date. If notice that the call had been made were necessary, such notice should have been given and the action commenced within five years. Two years of the time had elapsed when the receiver took possession of the assets and books of the company, in October, 1874, and he should have brought the action within the remaining three years of the five. The subscribers agree to pay from time to time as the directors may order. Neither the Articles of Incorporation, nor the contract of subscription provide, that notice, that a call has been made shall be given. Notice, therefore, to the subscriber, was not necessary.

Moarawitz on Corp., Vol. 1, Sec's 146–147;

Illinois River Railway Co. vs. *Zimmer*, 20 Illinois, 658–659;

Am. & Eng. Ency. of Law, Vol. 23, pages 810–811.

The appointment of the receiver in October, 1874, would not stop the statute from running against this call, in favor of the stock-holder, any more than it would stop the statute from running on a promissory note due the company, that came into his hands as such receiver. There is no evidence that defendant received notice of this call. The call was made in June, 1872, and this cause was tried in the lower Court in 1890, eighteen years after said call, and defendant had no recollection of such notice. The presumption is that the officers of the company did their duty and mailed the notice. Such notice was not necessary. The commencement of an action under the call, would have been sufficient demand or notice.

The contract of subscription reads, that payment shall be made as the directors may order, and these resolutions were passed by the executive committee. This fact is not a valid objection to the validity of the call. The Articles of Incorporation provide, that the affairs of the corporation shall be managed by a board of directors or trustees, and that said board of directors or trustees shall elect, from their own body, an executive committee of three, upon whom they may devolve the exercise of such of their powers and duties, etc., as they may deem for the best interests of the company (R., p. 21).

This executive committee is not only provided for in the articles of incorporation but is composed

of the directors of the company. The resolutions were duly entered of record and signed by the president of the company. The directors had knowledge of the call and have never dissented from the same. The call is valid and neither the company nor its receiver can be heard, eighteen years later, to dispute the authority of the officers making the call.

Railway Co. vs. *Keokuk Bridge Co.*, 131 U. S., 381.

If a call be invalid or irregular, a share-holder may object, but the company certainly cannot.

A call is nothing more than an official declaration that the sums subscribed for are required to be paid. A direction to collect necessarily involves such a declaration.

Braddock vs. *Phil. Marlton & Medford R. R. Company*, 45 N. J. Law Rep., page 365.

These resolutions certainly constitute a call or its equivalent.

ARGUMENT.

I.

WANT OF JURISDICTION.

The case at bar was commenced and prosecuted in the State Courts of Iowa, and brought to this Court on writ of error to the Supreme Court, the Court of last resort in the State. To give this Court jurisdiction of this cause, there must be a federal question involved and decided adversely to the plaintiff in error by the Court below.

To come within the meaning of the Constitution and law of Congress herein-before cited, there should be a final judgment, rendered in a suit by a Court having jurisdiction of the parties personally, and of the subject matter. A final judgment should be rendered in a suit by a Court having jurisdiction of the subject matter, in an action to which the defendant was personally a party. Then the question whether full faith and credit was given to such judgment, by the Supreme Court of Iowa, would be a federal question.

Embry vs. *Palmer*, 107 U. S., 3–9;
Crescent Live Stock Company vs. *Butchers' Union*, 120 U. S., 141–146.
Black on Judgments, Vol. 2, Sec. 867.

The order in question is not a judicial record or proceeding within the meaning of the Constitution and law above cited. It is not a final judgment, neither is it a judgment, decree or judicial proceeding, rendered in an action to which the defendant in error was individually a party. The Circuit Court of Cook County, Illinois, had no jurisdiction of the defendant individually or personally; neither was the defendant a party to the action in which the order was made. The case at bar is not founded upon a judgment or decree of the Court of Illinois against this defendant. The foundation of this cause of action was the contract of subscription by defendant, to pay as required by the board of directors. The order in question is only a call made by the Court, and has no greater judicial effect against defendant, in the case at bar, than if made by the officers of the Company.

The liability of defendant in this action, if any, is personal and by contract, and has no relation to corporate matters. Jurisdiction of the corporation would not give the Court jurisdiction of defendant, nor of the subject matter of this action. As to the subject matter of this action defendant would not be represented by the corporation. The contract of subscription is the same as a promissory note payable on demand. The corporation was not the agent of defendant in respect to his contract liability in any other sense, than the payee of a note payable

on demand, is the agent of the maker to make such demand.

White vs. *Smith*, 77 Illinois, 351;
Goshen Turnpike Co. vs. *Hurtin*, 9 Johns, 217;
Bennett vs. *Great Western Telegraph Co.*, 53 Illinois Appellate Court Reports, 280–281.
Ward vs. *Farwell*, 97 Ill., 593.

The two cases last above cited are quoted from at length hereafter in Division 3, of this Argument.

In the case of *D'Arcy* vs. *Ketcham*, 11 How., 165, this Court had under consideration the statute of the State of New York, providing where joint debtors are sued and one is brought into court on process, if judgment be rendered for the plaintiff, he shall have judgment not only against the party brought into Court, but also against other joint debtors named in the original process. Judgment was given in the Court of New York against two partners, one of whom was not served. An action was brought against him in Louisana upon this judgment. On pages 175 and 176 this court held that judgments rendered in one should bind citizens of other states, where defendants had been served with process or voluntarily made defense; but that Congress, by the Act of 1790 (being the law above cited), did not intend to embrace judicial records, where there was no personal service upon, or appearance by the defendant. In the case at bar, the Illinois Court had jurisdiction only of the

corporation and not of this defendant, and the Act of Congress does not embrace judicial records of this description.

In the case of *Du Passeur* vs. *Rochereau*, 21 Wall., 135, this Court said:

"The same general rule of law and justice prevails in Louisiana, as elsewhere, to the effect that no persons are bound by a judgment or decree, except those who were parties to it and have had an opportunity of presenting their rights."

In the case of *Public Works* vs. *Columbia College*, 17 Wall., 521, a joint judgment was rendered in the Courts of New York against all the partners, some of whom were summoned by publication, action being brought ~~thereon~~ in the Courts of Virginia upon the judgment; this Court on page No. 528 held:

"That the clause of the Federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, applies to the records and proceedings of Courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit."

See also the case of *Pennoyer* vs. *Neff*, 95 U. S., 714 to 734, inclusive, where it is held that a judgment, in *personam*, without personal service upon or voluntary appearance by the defendant, is a nullity.

Plaintiff in this action seeks to preclude defendant by the order of assessment in question, and so obtain a judgment for a money demand against the

defendant personally, which is contrary to the rulings of this Court in the cases above cited. If this were permitted such judgment would be rendered without "due process of law."

The Circuit Court of Cook County, Illinois, could not render a decree against defendant, personally, in the suit where he was not a party, for the four hundred and thirty-seven dollars and fifty cents ($437.50) sued for in this action, and proceed to its collection. But it is contended by plaintiff that said Circuit Court had jurisdiction to do what amounts to the same thing, preclude him from all defense, and leave to another court the task of entering judgment in accordance with its conclusive decree.

In the case of *Insurance Company* vs. *Harris*, 97 U. S., 331, on page 336, this Court held, that when a final judgment was rendered, it closed the controversy and after that the person assured by the policies could not maintain a suit on them in that state, in the same or any other Court, nor in any other state in the Union. This is settled by the Act of Congress of May 26th, 1790, which declares that the records and judicial proceedings of the Courts of any state, when authenticated, shall have such faith and credit, etc. This Court then used the following language:

"The meaning of this is, that when a judgment or decree has been given in one state by a Court having jurisdiction of

the parties and the subject matter, it has the same force and effect when pleaded or offered in evidence in the Courts of any other state."

To come within the provisions of the Constitution and law above cited the judgment must be certain, or capable of being made so, and it must be a final judgment, an interlocutory order not being enforcible.

Am. and Eng. Ency. of Law, Vol. 12, p. 148m.

The order of assessment in question is not a final judgment or decree. It is interlocutory, and not fit to serve as the foundation for final process in the state where rendered.

Black on Judgments, Vol. 2, Sec. 867.

The case of *Glenn* vs. *Saxon*, 68 Cal., 353, is in point upon this question of jurisdiction. The action was commenced to recover a call or assessment made by the Court of Virginia. The defendant, a share-holder, pleaded the statute of limitations of California which provides that:

"An action upon a judgment or decree of any court of the United States, or of any state within the Union, may be brought within five years.

"An action upon a contract, obligation or liability not founded upon an instrument of writing, or founded upon an instrument of writing *executed out of the state*, within two years."

The question in the case was, whether the action was founded upon a judgment of the Court of Virginia or whether it was upon a contract or an instrument of writing executed out of the state. If

the order of assessment made by the Court of Virginia were a judgment, as claimed by plaintiff, the cause of action was not barred by the laws of California, but if founded upon the contract of subscription, the action was barred.

The Supreme Court of California held, on page 358, that the call made by the Court of Virginia, was the same in effect as if it had been made by the officers of the company. That the foundation of the cause of action was the defendant's contract to pay the residue of his subscription as required, and, having been made without the state, the action should have been brought within two years after the right of action accrued. The Court then used the following language:

"It is quite clear that the case in hand is not founded on a judgment or decree within the meaning of Section 336 of the Code of Civil Procedure."

The order of assessment or call in the case at bar is not a judgment within the meaning of the Constitution and law of the United States. This action is founded upon the defendant's contract to pay the residue of his subscription, and not upon a judgment of the Court of Illinois. The order of assessment made by the Court of Illinois has no more effect to estop defendant in this action than if made by the officers of the Company.

Whatever questions may be found in the record of this cause, the decision of the Supreme Court of

Iowa was upon a question not of a federal character, and one broad enough to sustain the judgment. Therefore, defendant contends that this Court has no jurisdiction and should dismiss the cause.

Miller's Executors vs. *Swan*, 150 U. S., 132–134–137, and authorities cited.

The case just cited was brought to this Court on writ of error to the Supreme Court of the State of Alabama. The decision of the Supreme Court of Alabama was based upon the construction of a state statute. This Court held that the construction of the state statute presented no question of a federal nature. In the case at bar the decision of the Supreme Court of Iowa was based upon the construction of the statute of limitations of the State of Iowa, and presents no question of a federal nature.

When the bar of the statute of limitations, under the laws and decisions of the state of Iowa, began to be operative, has been construed by the Court of last resort of that state. When the plaintiff had a right to sue, was a question concerning the construction when the statue commenced to run, or when he was obliged to bring his action. Those questions were purely within the province of the Supreme Court of Iowa. The rule is, that this Court will follow and apply such decision as conclusive in the case at bar.

Balkam vs. *Woodstock Iron Co.*, 154 U. S., 187–188–189.

II.

SECTION 2, ARTICLE IV., CONSTITUTION OF THE UNITED STATES, HAS NO APPLICATION.

The first paragraph of Section 2, Article IV., of the Constitution of the United States, is not applicable to the case at bar. The refusal by the Courts of one state, to give effect to the judgments of the Courts of another state, is an infringement of the first Section, Article IV., of the Constitution. So far as Section 905, R. S., relates to the effect to be given to the judicial proceedings of the states, it is founded on Article IV., Section 1, of the Constitution, which does not extend to the other cases covered by the statutes. The power to prescribe what effect shall be given to the judicial proceedings of the Courts of the United States, is conferred by other provisions of the Constitution.

DuPasseur vs. *Rochereau*, 21 Wall., 134;
Embry vs. *Palmer*, 107 U. S., 9.

III.

THE ORDER OF ASSESSMENT NOT CONCLUSIVE UPON DEFENDANT.

Plaintiff in error contends that the order in question has all the binding force and effect of a final judgment or decree rendered against defendant, by the Circuit Court of Cook County, Illinois, and under the law of Congress is conclusive evidence

against defendant, in this action, in the Courts of Iowa. A valid judgment by a Court of Illinois is not made by the Constitution or law of Congress a domestic judgment in the State of Iowa; neither is it entitled to the same force and effect, and execution cannot be issued thereon in the state of Iowa; neither can property be sold thereunder. It must first be made or passed into a judgment by the Courts of the state of Iowa. Congress has only defined the effect such a judgment shall have, as evidence, in a suit thereon in the state of Iowa. A final judgment or decree rendered against defendant by a Court of Illinois, having jurisdiction of defendant and the subject matter, would be conclusive evidence in a suit brought thereon in the Courts of Iowa. The order in question cannot have that effect in the case at bar. Such order is not a judicial proceeding within the meaning of the Constitution and law of Congress. The Circuit Court of Illinois did not have jurisdiction over the defendant personally. He was not a party to the proceeding in which the order was made. Jurisdiction over the corporation would not give the Court jurisdiction over the defendant, to preclude him in this action. As held by this Court in cases cited in division No. 1 of this argument, service upon one partner will not authorize a valid judgment against another partner, not served nor appearing in the case. Neither will jurisdiction of the corporation authorize an order or judgment against this defend-

ant, on a personal contract, in a proceeding to which this defendant was not personally a party.

As said by this Court, in *D'Arcy* vs. *Ketchum*, 11 How., pages 175–176, it was most reasonable on general principles of comity and justice that, among states and their citizens, united as ours are, judgments rendered in one should bind citizens of other states, where defendant had been served with process, or voluntarily made defense; but the Act of 1790 does not embrace judicial records where there has been no personal service upon, or voluntary appearance by the defendant.

In the case of *Public Works* vs. *Columbia College*, 17 Wall., pages 527–528, speaking of the judgment rendered by the Court of New York, in question in the case, this Court said:

> "It was rendered in that state without service or process upon him or his appearance in the action. Personal judgments thus rendered have no operation whatever out of the limitations of the state where rendered. Their effects are simply local. Out of the state they are nullities, not binding upon the non-resident defendant, nor establishing any claim against him. Such is the settled law of this country, asserted in repeated adjudications of this Court and of the State Courts."

This Court further held in that case, that the clause of the Federal Constitution, requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, applies to the records and proceedings of Courts,

only so far as they have jurisdiction. Wherever they want jurisdiction, the records are not entitled to credit.

To the same effect is the case of *Thompson* vs. *Whitman*, 18 Wall., 457–469. In the case just cited, this court held that the jurisdiction of the court by which a judgment is rendered in any state, is open to question by the defendant, notwithstanding the averments contained in the record of the judgment itself, and further, that the judgment by the Court in a suit against a citizen of such state in his absence and without any notice, express or implied, would be regarded in every external jurisdiction, as absolutely void and unenforcible.

To the same effect is the case of *Knowles* vs. *Gas Light and Coke Company*, 19 Wall., 58. If, in point of fact, then, the Circuit Court of Cook County, Illinois, did not have jurisdiction of the person of defendant, this action must fail, because a judgment obtained under such circumstances has no effect outside of the state in which it was rendered.

As said by this Court, in *Du Passeur* vs. *Rochereau*, 21 Wall., 135:

> "The same general rule of law and justice prevails in Louisiana, as elsewhere, to the effect that no persons are bound by a judgment or decree except those who are parties to it and have had an opportunity of presenting their rights."

The inquiry is not, whether defendant was personally in the state, but whether he, or some one

authorized to act for him in reference to the suit, had notice and appeared, or if he did not appear, whether he was bound to appear or suffer judgment by default.

See also, to the same effect, *Pennoyer* vs. *Neff*, 95 U. S., 714–726–734, inclusive;
St. Clair vs. *Cox*, 106 U. S., 350–353.

In the case of *Lamar Insurance Company* vs. *Hildreth*, 55 Iowa, 251, referring to this point, the Supreme Court of Iowa said:

"It is claimed that the proceedings in question were had in the exercise of the Chancery powers of the court, and not under the statute. If this be so, the defendant is not bound thereby, for the reason that he was not a party to the action."

In the case of *Stewart* vs. *Lay*, 45 Iowa, 611–612, and *Schoonover* vs. *Hinckley*, 48 Iowa, 85, the Supreme Court of the state of Iowa did not hold as contended by plaintiff in error, that the defendants were concluded by the decree of assessment from presenting any defense they may have had, but held that an equitable defense, charging fraud and collusion in the appointment of the receiver, etc., could not be sustained in these actions, and that all such irregularities must be corrected in the Court making the appointment, and expressly allowed the legal defenses asserted by the stock-holders, to stand.

As laid down in Am. and Eng. Ency. of Law, Vol. 12, page 148m:

"To come within the meaning of Section 1, Article IV, of the Constitution, and Section 905, R. S., the judgment must be certain or capable of being made so, and it must be a final judgment, an interlocutory order not being enforcible."

To the same effect see Black on Judgments, Vol. 2, Sec. 867.

A final judgment rendered in favor of a creditor against the corporation to which the stock-holder was not personally a party, would not be a valid, conclusive judgment or judicial proceeding against the stock-holder, in an action against the stock-holder to collect, from an alleged unpaid balance, the amount of said judgment. Such action would not be founded upon the judgment and neither would such judgment be conclusive evidence against the stock-holder in such action, as to his liability for the alleged unpaid balance, nor preclude any defense the stock-holder may have in such action against him. Such judgment would be evidence, only of the amount of the claim of the creditor against the corporation and would not preclude the stock-holder in an action against him personally from pleading any defense showing non-liability upon the alleged unpaid balance.

First National Bank of Garrettsville vs. *Greene*, 64 Iowa, 452.

So with this order of assessment. It is only evidence of the call and the amount thereof, and does not preclude the defendant in error from asserting

any defense showing non-liability upon the unpaid balance sued for in this action. To hold defendant precluded by said order of assessment, from asserting his defense in this action, would be to render judgment against and deprive him of his property without due process of law, in disregard of Article V, and Article XIV., amendments to the Constitution of the United States.

Pennoyer vs. *Neff*, 95 U. S., 733.

The question whether the order of assessment is conclusive upon the stock-holder, in an action against him, to collect an unpaid balance, has been passed upon recently by the Appellate Court of Illinois, Second District. This plaintiff in error brought suit in the Circuit Court of LaSalle County, Illinois, against William J. Bennett, to collect the amount of the assessment in question, from him as a stock-holder in the plaintiff corporation. The cause was taken, on writ of error by the defendant to said Appellate Court.

Bennett vs. *Great Western Telegraph Company*, 53 Ill. Appellate Court Rep., 276–279–280–281–282.

The identical order of assessment involved in the case at bar was under consideration in the case just cited.

The Appellate Court, in its opinion, page 279, said:

"But it is insisted that the assessment, however unequal, was conclusive against the defendant, without any opportunity of being heard, because it was made by a Court in a

proceeding where it had jurisdiction of the corporation. The claim is that in the levy of the assessment he was represented by the corporation before the court, and therefore he was concluded. It is settled that the interests of stock-holders, in their relations as such, are represented by the presence of the corporation in a litigation affecting those interests. (*Great Western Telegraph Company* vs. *Gray*, 122 Illinois, 630; *Bates* vs. *Great Western Telegraph Company*, 134 Illinois, 536). Where a cause of action relates to property, property rights, or liabilities of the corporation, the stock-holders are not necessary parties, but the corporation is the real party in interest, although the result will affect the interests of stock-holders. As to those interests, the corporation is the common representative of all the members. The creditor seeks his remedy against the corporation, and a valid judgment or decree against it, binds the stock-holders. The interest of the defendant, in his relation as a member of the corporation, was the right to a given share in its assets after the payment of liabilities. By becoming a stockholder, he submitted himself to be represented by the corporation in the management of the corporate property and franchises in which he thus acquired an interest. The declaration alleged that the Circuit Court of Cook County, having jurisdiction of the corporation, took control of it and its powers, property and affairs, and that liabilities were established against it. The defendant could not, in this suit, question the action of the Court in those matters, for his interest in them is the same as the body of the stock-holders which is represented by the corporation. The property and franchise taken and placed in the hands of the receiver, belonged to the corporation as such. The interest of the defendant as a stock-holder, as we understand it, is such interest as arises out of the relation, and is common to stock-holders. As to any such interest, not distinguishable in character or kind from that of the body of the stockholders, he was represented in the suit by the corporation, which represented such body of stock-holders.

But so far as his liability for an unpaid balance on his contract of subscription was concerned, his relation to the corporation was personal, and was a contract relation. He agreed to pay the amount of his subscription when lawfully assessed, and the nature of his contract was the same as that of the maker of a promissory note, payable on demand. (*White* vs. *Smith*, 77 Ill., 351; *Goshen Turnpike Company* vs. *Hurtin*, 9 Johns, 217.)

The corporation was not his agent, in respect to such contract liability in any other sense, than the payee of a note payable on demand is the agent of the maker to make such demand. If a lawful demand should be made, the relation of debtor and creditor would be created. The relation involved his supposed individual liability to the corporation, and not the interest acquired in it by stock-holders.

The distinction between cases where nothing is required of stock-holders personally, and cases where an attempt is made to charge them personally, is clearly drawn by the Supreme Court, in *Ward* vs. *Farwell*, 97 Ill., 593. Under the rules there stated, it would seem clear that the Circuit Court of Cook County could not enter a decree against defendant personally, in the suit where he was not a party, for the two hundred and eighteen dollars and seventy-five cents ($218.75) here sued for, and proceed to its collection. But it is contended that it has jurisdiction to do what amounts to the same thing, strip him of all defense, and leave to another court the task of entering judgment in accordance with its binding decree. Counsel for appellee say that the law has been so finally settled by the Supreme Court in the case of *Great Western Telegraph Company* vs. *Gray*, *supra*. We do not so understand. The question was not presented to the Court or decided. What is there held concerning the assessment, is that the directors having neglected to make the assessment, the Court, in their place, might make it, and that, as it was not necessary for a stockholder to have been before the board when an assessment was made, it was no more necessary for him to have been before the Court when

it, in place of the directors, made the call or order of assessment. The Court had taken control of the corporation, and had become entitled to exercise its functions. It clearly appears that the levy of the assessment was the exercise of a corporate function. It was among the powers of the board of directors, and in default of the exercise of the power by them, it was levied by the Court. We find no intimation that the act of the Court, in the exercise of the power in their stead, would have any greater effect than an assessment made by them would have had. It seems to us that the Court could only do what the board, in the exercise of the same corporate power, might have done: and that the defendant, who was not a party to the proceeding, was not concluded by an assessment which the board could not have made. * * *

We are of the opinion that the demurrer should have been sustained. The judgment will be reversed and the cause remanded."

Upon this point the Supreme Court of Illinois, in the case of *Ward* vs. *Farwell*, 97 Ill., 616–617, said:

"The general rule unquestionably is, that where some right is sought to be enforced against a corporation, and the relief asked will only affect the stock-holders, as stock-holders, and no discovery or relief is sought against them as individuals, then they are unnecessary parties to a bill in Chancery. * * * * Where nothing is required of them personally, they are sufficiently represented by the corporation itself."

See also upon this point, *Great Western Telegraph Company* vs. *Burnham*, 79 Wis., 47; S. C. 47, N. W. Rep., 373–374.

The order in question, therefore, is not a judicial proceeding within the meaning of the Constitution and law, conclusive upon the defendant as to his

liability in this action. Neither are his defenses, including the plea of the statute of limitations, rendered unavailing thereby.

IV.

THE ORDER OF ASSESSMENT HAS NO MORE FORCE AND EFFECT THAN IF MADE BY THE OFFICERS OF THE COMPANY.

The call made by the Circuit Court of Illinois was the same, in effect, as if it had been made by the officers of the corporation. If the assessment be not made by the officers, under proper circumstances, the Court can make the same, and a stock-holder can present the same defenses in an action against him to collect the assessment, made by the court, that he could have done if the assessment had been made by the officers. A call made by the Court can have no greater effect or binding force judicially, against the stock-holder, than a resolution by the board of officers, for the same purpose. An assessment by the Court is only a call and authority to the company or receiver, to proceed to collect the amount, and a stock-holder is no more bound by it, than he would be by a resolution passed by the officers making the same call.

Glenn vs. *Saxton*, 68 Cal., 358;

Great Western Tel. Co. vs. *Gray*, 122 Illinois, 640.

In the case of *Lamb* vs. *Lamb*, 6 Biss., 424, the Court said:

"It is insisted that the defendant is precluded from making this defense by the judgment of the Court which made the assessment on the premium notes. An order of the Court has the same force as an assessment made by the company, with this exception, that the makers of the premium notes will not be allowed to dispute the correctness of the amount of the assessment. The order of assessment was made without personal service and the notice given to the policy holders by publication, was general, without naming them. It will readily appear that, when making such order it is not possible for Courts to hear and decide upon all the various defenses which a numerous body might be justly entitled to present. As for example, *non est factum*, surrender and acceptance of a policy, that the note was obtained through fraud or was made in violation of the law, etc. These defenses can and ought to be heard when actions are brought for the recovery of the premium notes."

Lamar Insurance Company vs. Hildreth, 55 Iowa, 251, is exactly in point, and the Supreme Court of Iowa said:

"It is claimed that the proceedings in question were had in the exercise of the Chancery powers of the Court, and not under statute, if this be so, the defendant is not bound thereby for the reason that he was not a party to the action."

In the case at bar, the defendant had no personal notice, and did not have notice even by publication. Such notice is not even claimed by plaintiff in error. The only claim made, is, that the order of assessment was made in the Terwilliger suit, to which defendant was a party complainant. The Circuit Court of Cook County, Illinois, in the order

of assessment, did not and could not pass upon the many defenses to which the stockholder is entitled, and such defenses can and ought to be heard in this action. As this Court said in *Du Passeur* vs. *Rochereau, supra:*

"No persons are bound by a judgment or decree, except those were parties to it and have had an opportunity to present their rights."

Defendant, therefore, in the case at bar, is not precluded by the order of assessment.

This Court held in *Hawkins* vs. *Glenn*, 131 U. S., 319, followed in *Glenn* vs. *Liggett*, 135 U. S., 553, and in *Glenn* vs. *Marbury*, 145 U. S., 499, that a stockholder is bound by a decree of assessment, made by a Court of equity, having jurisdiction of the corporation, although not a party as an individual. The defendant in the case of *Hawkins* vs. *Glenn*, contended or pleaded that there had been no call as to him, because he was not a party to the cause between creditor and corporation. The holding is, therefore, in these cases, to the effect only that jurisdiction of the corporation is sufficient to authorize a decree of assessment by the Court. Such assessment being a corporate matter or the exercise of a corporate function by the Court.

See *Hawkins* vs. *Glenn*, 131 U. S., 329.

It is not necessary that the stock-holders should be before the Court, nor before the board of directors, in order that a valid assessment or call may be made.

That is, a valid call can be made by the Court having jurisdiction of the corporation, the same as if a call were made by the officers of the corporation, and stock-holders are not entitled to prior notice that such call will be made, by either the Court or the officers. Such call would be valid and the order, making the same, evidence that a call had been made, and of the amount called. Defendant in error respectfully submits that this Court does not hold in these cases, that such call is conclusive upon the stock-holder as to his liability, and precludes him from asserting any defense to the action brought against him, individually, to collect the amount of the call. Upon the issue or plea made in that case, the words that "the stock-holder is bound" by the order making the call, must refer to the validity of the call itself, that is, the jurisdiction of the court to make the call, and binds the stock-holder no further.

The corporation does not represent the stock-holder as to his personal liability. Otherwise, the Court making the call, could as well have rendered judgment at the same time, against each of the stock-holders, for the amount of the call, and awarded execution thereon. Further, this Court considered and passed upon the several defenses asserted by the defendants in these causes, which would not have been done were the defendants precluded by the call, from asserting any defense in the action to collect the amount of the

call. The plea of the statute of limitation was held open to defendant in *Glenn* vs. *Marbury*, 145 U. S., 506. Again, these actions were commenced in the Circuit Court of the United States, and brought to this Court on writ of error. The case at bar was commenced in the State Court and brought to this Court from the Supreme Court of the State of Iowa on writ of error.

Defendant in error, among other defenses, in the State Court of Iowa, pleaded the statute of limitations. There is, therefore, involved in this case, the construction of a state statute by the Supreme Court of the state of Iowa, and in conformity with the settled construction of such statue for many years, the Supreme Court of Iowa held this action barred by the statute of limitations. In this respect, this action differs materially from the Glenn cases.

In an action commenced in the State Courts and taken to this Court therefrom, this Court will regard and follow the construction placed upon the statute by the Court of last resort, of the state.

Further, the facts in this case are different from the Glenn cases, in this, that it is alleged by plaintiff, and denied by defendant, that this order was made in a suit to which defendant was a party complainant, and that, by reason thereof, he is bound by the order, and that the suit is founded upon such order, such order being a judgment against the defendant,

and defendant is precluded by reason thereof from asserting any defense in the action. Plaintiff cannot recover in this action unless these allegations be true, that the order of assessment was made in the Terwilliger case, to which defendant was a party complainant, and defendant is concluded thereby, for that reason. Plaintiff alleges no other order of assessment and claims upon no other order of assessment, and, as the evidence conclusively shows, that the order of assessment was not made in the Terwilliger case, to which defendant was a party complainant, plaintiff's action must fail, and he is not entitled to recover.

Further, defendant pleads that all unpaid balances of stock were duly called and made payable on the 12th day of July, 1872, by resolution passed by the proper officers of the company, June 5, 1872, and that the statute of limitations commenced to run from that date. In this class of cases, to a great extent, each case must be decided upon the particular facts arising in the case. In *D'Arcy* vs. *Ketcham*, 11 How., 175, this Court, speaking of the decision in the case of *Mills* vs. *Duryee*, 7 Cranch, 483, said:

"This decision was made in 1813, and has since been followed as the binding and proper construction of the Act of 1790, in cases where process has been served. But as then predicted (and has been manifest ever since), great embarrassment must ensue if the construction of the facts of that particular case is applied to all others, without exception."

If this court therefore, as plaintiff contends, held in the Glenn cases, that the stock-holder, by the order of assessment, was precluded from pleading any defense, when sued for the amount of the call, the facts in the case at bar, so different from the Glenn cases, should constitute an exception to the rule. Defendant contends that such is not the effect of the decision in the Glenn cases, and as evidence of this construction, refers to the many cases herein-before cited, passed upon by this Court, wherein it was held that no person is concluded by a judgment or decree, to which he was not personally a party, and that any judicial record or proceeding in which defendant was not served with personal notice, or made voluntary appearance, is not entitled to any faith and credit, in a subsequent action against defendant, personally, in any external jurisdiction.

V.

DEFENDANT WAS NOT A PARTY TO THE SUIT OR PROCEEDINGS IN WHICH THE RECEIVER WAS APPOINTED AND THE ORDER OF ASSESSMENT MADE.

It is alleged by plaintiff that the appointment of the receiver and the order of assessment in question, was made in the Terwilliger suit, to which this defendant was a party complainant, and that, by reason thereof, defendant is bound thereby.

These allegations are denied by defendant, and he further pleads that said Terwilliger suit was finally determined November 16th, 1872, and that a new action was commenced, by way of supplemental bill, in said Circuit Court, September 19, 1874, between new parties, and founded on new and different subject matter, entitled in said Terwilliger cause, wherein J. M. W. Jones, *et al.*, were complainants, and said corporation, Joshua Stark, *et al.*, were respondents, in which new action a receiver was appointed October 7th, 1874, and the order of assessment made July 10th, 1886. That defendant was in no way a party to said proceedings in which the receiver was appointed and said order of assessment made.

In the Terwilliger suit, the complainants asked that certain contracts between Selah Reeve and the corporation, of date March 25th and March 26th, 1868, be declared fraudulent and set aside, and that the corporation be required to issue certificates of full paid stock to complainants, for the money paid (R., p. 61).

The respondents duly filed answers therein, in January, 1870 (R., pp. 61–62).

No order of assessment was asked for in the Terwilliger case, to which defendant was a party, either by complainants or respondents. The Court had no jurisdiction to make such order in that case. "If a Court grants relief which, under no circum-

stances, it has any authority to grant, its judgment to that extent is void."

Freeman on Judgments, Vol. 1, Sec. 120, 4th Ed.

The order of assessment was asked for by the receiver May, 1886, fourteen years after the final termination of said Terwilliger suit, November 16, 1872 (R., pp. 5–6).

The Terwilliger suit in question was commenced by Jeremiah Terwilliger, this defendant, Hiram Purdy *et al.*, complainants, against the Great Western Telegraph Company, Josiah Snow, Selah Reeve, and David A. Gage, respondents.

This action was finally determined and disposed of, so far as this defendant and others, complainants therein, were concerned, by final decree of said Circuit Court of Cook County, Illinois, November 16th, 1872 (R., pp. 15–16–17).

Costs were awarded to complainants against respondents, which were paid by respondents, on execution, January 7th, 1873 (R., pp. 15–63).

The only question remaining open, under said final decree, in the case, was the accounting ordered, between the Great Western Telegraph Company, and Selah Reeve, co-defendants. Said accounting to be made amicably, if possible; if not, suit for such accounting was ordered to be commenced by said corporation against its co-defendant, Selah Reeve. With this part of said final decree, this defendant was in no way interested or connected.

So far as this defendant was concerned in said suit said final decree was fully performed January the 7th, 1873, by the payment of costs, as above stated, and by the meeting of stock-holders as directed in said decree, and the election of new officers, January 28th, 29th and 30th, 1873, and the issuing of the certificates of stock as directed by said decree (R., pp. 85–86).

The certificate of stock to defendant for twenty-seven and one-half shares, was issued January 29th, 1873 (R., p. 19).

By this record evidence, it is clearly shown that said Terwilliger suit, to which defendant was a party complainant, was disposed of by final decree, November 16th, 1872, and said decree fully performed as to this defendant in January, 1873. This was the end of the action or suit, as to this defendant, and he then and there stepped down and out.

The next proceeding was the filing of a petition by The Great Western Telegraph Company, *et al.*, as complainants against its co-defendant, Selah Reeve, for an accounting, etc., March 5th, 1873 (R., pp. 64–65–66.)

Defendant was in no way a party to this proceeding.

September 19th, 1874, an action was commenced in said Circuit Court of Cook County, entitled in said Terwilliger suit, by way of "supplemental bill,"

between J. M. W. Jones, John I. Bennett, *et al.*, complainants, vs. Joshua Stark, Abel H. Bliss, The Great Western Telegraph Company, *et al.*, respondents, alleging fraud, etc., against the then officers of The Great Western Telegraph Company, and asking for the appointment of a receiver (R., pp. 69–70–71–72.)

October 7th, 1874, a written agreement for the appointment of a receiver under said "supplemental bill," dated October the 5th, 1874, was filed in said court, and pursuant to said agreement, Erastus S. Williams, judge of said Court, appointed a receiver October 7th, 1874 (R., pp. 74–75).

This defendant was in no way a party to said supplemental bill, said agreement for the appointment of a receiver, nor to said order appointing the receiver.

Afterwards, this action commenced by said supplemental bill being still pending, the order of assessment in question was made July 10th, 1886, on *ex parte* application by the receiver (R. pp. 5–6–7–8–9).

Defendant was not a party to the proceedings in which said order was made.

The original suit by Jeremiah Terwilliger, this defendant *et el.*, against The Great Western Telegraph Company, David A. Gage, Josiah Snow, and Selah Reeve, was finally determined as herein-before

stated, November 16th, 1872. The new action, by way of "supplemental bill," commenced two years thereafter, September 19th, 1874, was by J. M. W. Jones, John I. Bennett *et al.*, vs. Joshua Stark, Abel H. Bliss *et al.*, new and different parties than those to the original Terwilliger suit. The original Terwilliger suit was brought to set aside the contracts therein mentioned and to compel the issuance of certificates of stock. The new action on the supplemental bill was commenced, for the appointment of a receiver, by reason of fraud on the part of the officers of the company, elected in January, 1873. The facts then, upon which the two suits were founded, are entirely different, and in no way connected. The appointment of a receiver was made under said new action, to-wit: said supplemental bill, and by written agreement commencing as follows:

"It is mutually agreed by the parties to the supplemental bill in the above cause, filed as follows: 1st. A receiver shall be appointed in the above cause, by the Court," etc. Then follow the signatures.

The order appointing the receiver under said agreement, reads as follows:

"And now, at this date, come the parties to the above entitled cause, the said complainants in said supplemental bill, etc., and said defendants, etc." (R., pp. 74–75).

The order of assessment in question was made twelve years after the appointment of the receiver, to-wit: July 10th, 1886. This evidence

clearly shows that no receiver was appointed in the Terwilliger suit, to which this defendant was a party complainant. Said suit having been determined, November 16th, 1872, and the receiver was appointed in the new action on the supplemental bill, two years thereafter, October the 7th, 1874, upon written stipulation by the parties to the supplemental bill, and to no part of which defendant was a party. Further, the original order appointing the receiver, by Judge Williams, is entitled in said supplemental bill; reciting that complainants and defendants to said supplemental bill, appearing therein, were present and had notice.

The record, therefore, of said order of assessment, showing the same to be entitled in the original Terwilliger suit, and as made therein, is incorrect, erroneous, and without authority. And further, said order of assessment (R., p. 7) is incorrect and erroneous wherein it recites that said Terwilliger suit was commenced in 1869; was, at the date of said order, July 10th, 1886, still pending and undetermined. Further, said order shows and recites (R., p. 7), that the receiver was appointed upon the supplemental bill of complainant, filed in the cause.

Defendant testifies that he was in no way a party to said supplemental bill, nor to the proceedings in which the order of assessment was made. That he never had notice thereof, and never appeared therein (R., pp. 88–89).

The evidence clearly shows that the order of assessment was not made in the Terwilliger suit, to which defendant was a party, and defendant is not bound thereby, as alleged in plaintiff's petition, and plaintiff is not entitled to recover in this action.

That a suit may be determined as to the rights of certain parties therein, and still remain pending as to the rights of other parties, is elementary and so well settled that a citation of authorities is not necessary. However, defendant in error cites the following authorities as applicable to this point.

Withenbury vs. *United States*, 5 Wall., 1819;
Williams vs. *Morgan*, 111 U. S., 684;
Hill vs. *R. R. Co.*, 140 U. S., 52;
Central Trust Company vs. *Marietta & N. G. Ry. Co.*, 48 Fed. Rep., 850;
Grant vs. *R. R. Co.*, 50 Fed. Rep., 795;
Standley vs. *Roberts*, 59 Fed. Rep., 839–840.

VI.

THE ORDER OF ASSESSMENT NOT VALID UNDER THE STATUTE OF ILLINOIS.

The assessment in question was made by the Circuit Court of the state of Illinois. Defendant was not a party to the proceedings or action in which the assessment was made. It is provided by the laws of Illinois, to-wit: An "Act Concerning Corporation," approved April 18th, 1872 and in force from

and after July 1st, 1872, that a stock-holder must be personally a party to the action in which the assessment is made or he is not bound thereby, and the receiver has no authority to maintain an action for the collection of such assessment (R. p. 55).

The act in question took effect July 1st, 1872, and the receiver herein, was appointed October the 7th, 1874, two years after the taking effect of the law. Consequently, under said law, the statute of Illinois, and the decisions of the Supreme Court of the state of Illinois, defendant not being a party to the action in which said order of assessment was made is in no way bound thereby.

Public Laws of Illinois, 1871 and 1872, page 302;
Revised Statutes of Illinois, 1877, Vol. 1, pages 286–287;
Chandler vs. *Brown*, 77 Illinois, 333;
Chestnut vs. *Pennell*, 92 Illinois, 55;
Lamar Ins. Co. vs. *Gulick*, 102 Illinois, 41.

The three cases last above cited, were commenced against the stock-holder, to collect the amount of an assessment made by the Court. The Supreme Court of Illinois in each case held that the decree of assessment was not conclusive upon the stock-holder in such action, and in fact held further that such decree of assessment was in no way binding upon the stockholder, for the reason that he was not a party to the proceedings in which the order of assessment was made. In the case of *Chandler*

vs. *Brown* and *Chestnut* vs. *Pennell*, the Court seems to place its ruling under Section 25 of the law of 1872. But in the case of *Lamar Insurance Company* vs. *Gulick*, no reference is made to the statute.

It will be claimed by counsel for plaintiff, that in the case of *The Great Western Telegraph Company* vs. *Gray*, 122 Illinois, 630–637–638, the Supreme Court of Illinois held differently from the decisions in the case of *Chandler* vs. *Brown*, *Chestnut* vs. *Pennell*, and *Lamar Insurance Company* vs. *Gulick*, *supra*, and the Act of 1872, above mentioned, does not apply.

That Court could well hold the way it did upon the record in the Gray case. The petition in that case stated that the Terwilliger suit was commenced in 1869, and has *ever since been pending*, and that the *receiver was appointed in that suit, and that the assessment was made in that case.* The defendant *demurred* to this petition, thereby *admitting all those allegations*, and the Court in the Gray case held, that being the fact, the suit having been commenced before the Act of 1872 was passed, it did not apply to that case, and the receiver appointed therein was not governed by said act.

This Court will see the great difference between the record in that case and in the Lamar and Chandler cases, and also in the case at bar. The same allegations are made in the petition at bar as in the Gray case, that the Terwilliger case was com-

menced in 1869, and has been ever since and is now pending, and that the receiver was appointed and an assessment made in that case with the same intention of avoiding the effect of the Act of 1872 in this case, as plaintiff had in the Gray case, but defendant did not demur to the petition, and thereby *admit all these facts* so as to come within the ruling in the Gray case, but not only denies, and proves to be the fact, that the receiver was not appointed in the original Terwilliger suit, but was appointed in 1874 on a *new bill between different parties* two years after the taking effect of said Act of 1872. Appellee also alleges and proves that he was not a party to the proceedings in which the receiver was appointed and the order of assessment made, consequently the decisions in the Chandler and Lamar cases in Illinois are in point and applicable to this case.

VII.

THE RECORD DOES NOT SHOW THE EFFECT GIVEN TO THE ORDER OF ASSESSMENT IN QUESTION BY THE LAW OF ILLINOIS.

The case at bar was commenced in the State Court of Iowa, and brought to this Court on writ of error to the Supreme Court of said state. The action of the State Court of Iowa will be determined solely by the record, and the effect of the order of assessment in question, will be determined upon the evidence respecting the law of the state

of Illinois, in which the said order was made, and not upon the judicial knowledge of this Court, respecting such law. There is no evidence in the record showing the effect given to the order in question by the law of Illinois. In the case at bar, it is necessary for the plaintiff to prove this fact, the same as any other fact in the case. Upon this question, the following cases are in point:

Hanley vs. *Donogue*, 116 U. S., 1–5–6;
C. & A. R. R. Co. vs. *Wiggins Ferry Co.*, 119 U. S., 615–622–624;
Sayre vs. *Wheeler*, 31 Iowa, 114;
Freeman on Judgments, 4th Ed., Vol. 2, Sec. 571.

The Supreme Court of the State of Iowa does not take judicial notice of the laws of sister states. If the law of Illinois be not shown by the record, it will be presumed to be the same as that of the State of Iowa.

Stephens vs. *Williams*, 46 Iowa, 540;
Neese vs. *Farmers' Insurance Co.*, 55 Iowa, 604;
Hadley vs. *Gregory*, 57 Iowa, 158.

In *Hadley* vs. *Gregory*, 57 Iowa, 158, *supra*, the Supreme Court of the State of Iowa said:

"But the law prevailing in Indiana, applicable to this branch of the case, is not shown by the record. We will presume it to be the same as the law of this state."

The law of the State of Iowa, as declared by the Supreme Court of the State, is to the effect that the order of assessment in question is not conclusive

upon the defendant, and does not preclude him from asserting any defense he may have to this action.

Lamar Insurance Company vs. *Hildreth*, 55 Iowa, 248–251.

VIII.

ALLEGED CAUSE OF ACTION BARRED BY THE STATUTE OF LIMITATIONS, OF THE STATE OF IOWA.

The statute of limitations pertains to the remedy, and all suits must be brought within the time prescribed by the *lex fori*. The contract of subscription in question was made at Burlington, Iowa, the residence of the defendant, and is an Iowa contract, and was made with reference to the laws of the State of Iowa, including the statute of limitations.

The statute of limitations of Iowa, provides that action must be brought upon an unwritten contract within five years, and upon a written contract within ten years, after the cause of action accrued, and not afterwards. This action was commenced August the 30th, 1888. The corporation became insolvent, had exhausted its assets and ceased to carry on its business October the 7th, 1874. Although this action is entitled The Great Western Telegraph Company, for the use of the receiver, against Hiram Purdy, it is an action for and

on behalf of the creditors, and, in fact, by the creditors of the corporation. When a corporation ceases to do or carry on business, a stock-holder owes it nothing upon his subscription. The only liability of the stock-holder is to the creditor of the corporation, and his contract of subscription is with the company, and not with the creditors of the corporation. An action to collect an unpaid balance to pay creditors, would be barred in five years under the statute of the State of Iowa, the liability of the stock-holder to the creditor being upon an implied or unwritten contract.

First National Bank of Garrettsville vs. *Greene*, Admr., 64 Iowa, 445.

If a surety pay the amount of a promissory note for his principal, the action by the surety to recover the amount so paid, against the principal, would not be upon the promissory note, but upon an implied or unwritten contract against the principal, for money paid. The payee or holder of the note would have ten years under the statute, after maturity of the note, to bring his action, but the surety must bring his action for the money paid, as above stated, within five years.

Lamb vs. *Withrow*, 31 Iowa, 164;
Johnson vs. *Belden*, 49 Iowa, 301.

Viewing this action, as by the creditors of the corporation, represented by the receiver, or by the corporation for the creditors, to recover against the

stock-holder, the action would be barred in five years from the time the cause of action accrued. An action upon an assessment, by the officers or by the Court, would be barred in five years.

If the Court, however, should be of the opinion that this action is founded upon the written contract of subscription in question, the action would be barred within ten years after the cause of action accrued. The cause of action accrued under the statute, as construed by the Supreme Court of the State of Iowa, at the date it became necessary to resort to unpaid balances to pay creditors. The company, as averred in its petition (R., p. 46), had exhausted its assets and ceased to do business October, 1874. At that date the liability of the stockholder to respond to the creditor became fixed. At that date this cause of action accrued.

The cause of action at bar, is precisely the same as if the corporation held a promissory note made by defendant, dated October 7th, 1874, payable on demand. The cause of action accrued at the date of such note, and action thereon must be commenced within ten years from date, and if demand be necessary before action commenced, such demand must be made and action commenced within ten years. The holder cannot wait ten years, make the demand and commence action ten years thereafter. The appointment of a receiver would not stop the statute from running.

The contract of subscription provides for payment as the directors, from time to time, may order. The cause of action accrued October 7, 1874, and action could have been commenced thereon at any time, after demand or call. The demand or call was not necessary to create the debt, but only necessary as a preliminary step to the commencement of the action. The corporation became insolvent, had exhausted its assets and ceased to do or carry on its business October, 1874. The necessary demand should have been made, in all equity and justice to the stock-holders, within a reasonable time thereafter. The company had need of funds, only to pay creditors. It was not then a going concern, and the liability of the stockholder to creditors for unpaid balances, accrued at that time, to-wit, October, 1874. Either the officers or the receiver should have made the call or demand necessary to the commencement of the action against the stockholders within five, or at most, within ten years from October, 1874.

The Supreme Court of the state of Iowa have construed the statute of limitations to the effect that a party holding a claim or right of action, can not be allowed to prolong the operation of the statute, by refusing to take steps which the law requires, in order to authorize the maintenance of the action. The demand by the plaintiff was not necessary to create the debt, but only as a preliminary

step to the commencement of the action. The demand or call was to be made by plaintiff. The right of action will be deemed to have accrued at the time when, by taking the proper steps, the action might have been brought.

Baker vs. *Johnson County*, 33 Iowa, 151;
Prescott vs. *Gonser*, 34 Iowa, 175;
Hintrager vs. *Hennessy*, 46 Iowa, 600;
Squier vs. *Parks*, 56 Iowa, 407;
Ball vs. *C. & N. W. R. R. Co.*, 62 Iowa, 751;
First National Bank of Garrettsville vs. *Green*, 64 Iowa, 445;
Lower vs. *Miller*, 66 Iowa, 408;
Hintrager vs. *Traut*, 69 Iowa, 746.

Section 2610, Code of Iowa, 1873, provides that no action shall be brought against the county on any unliquidated demand, until the same has been presented to the Board of Supervisors of said county, and payment demanded.

In the case of *Baker* vs. *Johnson County*, 33 Iowa, 151–154–155, the Court held that the statute of limitations commenced to run from the time the plaintiff had a claim against the county, and not from the time he presented it to the Board of Supervisors for allowance, and demanded payment. The plaintiff had no right to institute suit against the county until he had presented the claim to the Board of Supervisors, but it was held that the statute commenced to run from the time the cause of

action accrued, and not from the time of presentation and demand. The statute simply requires that an additional step shall be taken in pursuing the remedy, by action. It by no means interferes with the right of action.

In the case of *Prescott* vs. *Gouser*, 34 Iowa, 175–179, the plaintiff insisted that the right of action did not accrue against defendant until demand and refusal, and that the statute then only commenced to run. The Supreme Court of Iowa held as follows:

"But to hold that a plaintiff, who has a right to demand performance at any time, may delay such demand indefinitely, would enable him to defeat the object and purpose of the statute. It is certainly not the policy of the law to permit a party against whom the statute runs, to defeat its policy by neglecting to do an act which devolves upon him, in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled, for even fifty years unaffected by the statute of limitations, thereby rendering it a dead letter. In such a construction of the statute, we cannot concur."

In the case of *Hintrager* vs. *Hennessy*, 46 Iowa, 600, the Supreme Court held that the statute of limitations commenced to run from the time the plaintiff was entitled to the tax deed, and not from the time he demanded the same. That the plaintiff cannot, by his own act, prevent the running of the statute.

In the case of *Squier* vs. *Parks*, 56 Iowa, 407, it is held that the statute commences to run from the limit of the thirty or ninety days allowed by law for the filing of mechanic's lien, and not from the time of the actual filing of the lien. The action must be brought within two years from the date of expiration of the thirty or ninety days, allowed, and not from the date of actual filing.

In the case of *Ball* vs. *C. & N. W. R. R. Co.*, 62 Iowa, 751, the question of statute of limitations was involved, and the contract upon which the action was founded, was in writing, and provided that the deed be made to the company on demand. * * * * * The Supreme Court of Iowa said:

"The important inquiry is, when did the cause of action accrue? The deed was to be executed on demand. No cause of action accrued, it will be conceded, until after demand. * * * * * It has been held, when a right of action depends upon a demand, that such demand must be made within the period prescribed by the statute of limitations. As the demand was not made until more than ten years had elapsed after the right to make the demand accrued, the cause of action was fully barred."

In the case of *Lower* vs. *Miller*, Sheriff, 66 Iowa, 409–413, the Court held as follows:

"But suppose it should be conceded that the statute did not commence to run until a demand was made upon the sheriff, and suppose that the sheriff should be re-elected for a number of successive terms, and three years after his last election, which would be one year after the expiration of his last term of office, the plaintiff should make the demand and bring the action within three years after that, alleging that

the money was received by the sheriff more than eight or ten years before, and he had failed to pay it over to plaintiffs. No person has the right to postpone the operation of the statute of limitations in that manner, by failing to make the demand."

In the case of *Hintrager* vs. *Trant*, 69 Iowa, 746–748, the Court held that the plaintiff as against the statute of limitations, could not indefinitely prolong the time in which he may sue, by voluntarily failing to give the notice required, before the commencement of the action. When did plaintiff's cause of action accrue? In this case notice was required before the delivery of the deed. After citing other cases, the Court used the following language:

"In each case it is held that the cause of action accrued before the action could have been commenced, that is, before the respective plaintiffs could have maintained a suit by reason of the omission to do certain things required to be done, to entitle them to recover. Plaintiffs, upon their own volition, at any time after the cause of action accrued, could have perfected their rights, and brought suits upon their cause of action. Surely a plaintiff cannot indefinitely prolong the time in which he may sue, by voluntarily failing to do the things required by law to be done before the action may be brought."

The case of *First National Bank of Garrettsville* vs. *Greene, Administrator*, 64 Iowa, 445, is in point. This was an action by a creditor of the railroad company to enforce an unpaid balance against a stockholder. The action is not founded upon a contract of subscription, but upon the alleged fact, that

defendant was the holder of certain shares of stock, on which twenty per cent. only, had been paid. The Supreme Court of Iowa held the action barred in five years after the cause of action accrued, and the question was, when did the right of action accrue? The claim of the plaintiff against the railroad company became due July 1, 1875. Said Court held that the right of action was then complete. The defendant's obligation upon the unpaid balance then existed, and the right of the company, or the creditor to recover, was barred in five years. The creditor insisted that the statute did not commence to run until a judgment was obtained against the corporation, execution issued and returned *nulla bona*. The plaintiff's claim was founded upon bonds issued by company, and the Supreme Court of Iowa said, pages 448–449:

"In the case at bar, the action upon the bonds might have been brought at any time within ten years after they became due. The issuance of execution and demand for property to satisfy the same, could have been delayed for another period of ten or possibly, twenty years, and an action brought against a stock-holder five years thereafter. It is not the policy of the law to put it in the power of a party to thus extend the statutory limitations. Counsel on both sides have presented numerous adjudged cases in Courts of other states, which, it is claimed, are in point upon the question involved in the appeal. We need not cite or comment upon them because we think the principle here involved, has been determined by this Court."

Upon rehearing, the Supreme Court of Iowa, held as follows, pages 450–451:

"The answer alleges that the company became totally insolvent and ceased to do business in May, 1875. * * * * The Court then quotes Sections 1802–1803–1804 of the Code of Iowa, relating to proceedings against shareholders for unpaid balances.

What under these provisions fixes the liability of a stockholder?

1st. The non-payment of stock subscribed.

2nd. The inability of a creditor to collect his claim from property owned by the corporation, or, more properly, the fact that the corporation has no property from which the claim may be collected.

There is no dispute as to the first of these conditions, and as to the second, there can be no dispute as to the fact, for the answer, which is admitted by the demurrer, alleges that the company has had no property since 1875. Now, it can not be doubted that, upon the meeting of these two conditions, the creditor has the right to proceed against the stockholder. Why has he such right? Because he has a claim originally against the company, which the law declares is enforcible against the stockholder, who is liable therefor. When did plaintiff's cause of action accrue? Clearly when his claim became the ground of proceedings against the stockholder; that is a claim against him. At that time the plaintiff could have brought suit to enforce his claim against defendant. * * * * * * The judgment against the corporation does not pertain to the plaintiff's right of action, but to the evidence required, in order to establish it. * * * * The action and judgment against the corporation are simply matters of preparation for the trial of the action against the stockholder. Delay in such preparation does not affect the right of action, and such preparation, when completed, does not create it. It is like the taking of evidence preparatory to trial, it could not be said that a plaintiff had any cause of action until he had secured and prepared his evidence."

The ground of all these decisions, is that a party holding a claim or right of action may not be allowed to prolong the operation of the statute by refusing to take the steps which the law requires, in order to authorize the maintenance of the action.

In the case at bar, the demand upon or notice to the defendant, if necessary, should certainly have been made or given within five years, or at latest within ten years. But neither were necessary and only a matter of evidence. Neither demand nor notice would create the debt or right of action. The cause of action, in the case at bar, accrued to the company for the creditor, and to the creditor of the corporation, October, 1874. Then, as alleged in plaintiff's petition, the company became insolvent, had exhausted its assets, and ceased to carry on its business. The appointment of a receiver will not prevent the statute from running. The receiver has no other and greater rights under the law than the company had. He simply takes the place of the company. If promissory notes, or open accounts due the company, come into his hands, suit must be brought in ten or five years, or the claim would be barred. The statute would run against the company and equally so against the receiver. Plaintiff should have made a demand, if necessary, within ten years from October, 1874. A formal demand or call was not necessary. The commencement of an action by plaintiff against a stockholder, would have been a sufficient demand.

Hatch vs. *Dana*, 101 U. S., 205.

It is true, Courts of other states have held that upon a contract, payable upon demand, the statute will not commence to run until after demand has been made. This is not the rule adopted by the Supreme Court of Iowa. If a demand be necessary, such demand must be made and suit brought, within the time fixed by the statute for commencing the action. The debt, or right of action, is created by the contract and the demand is not necessary to create the debt. The right of action has already accrued, and the demand is only a preliminary step to the maintenance of the action. This rule has been established in the State of Iowa, by the Supreme Court, by a uniform line of decisions, commencing in 1871, and extending to the present time, a period of twenty-three years. This question is *stare decisis* in the State of Iowa.

The Appellate Court of Illinois, First District, on the fifteenth day of October, 1894, passed upon this question, and held a cause of action, identical with the one at bar, barred by the statute of limitations of the state of Iowa. One D. P. Stubbs, a resident of Fairfield, in Jefferson county, state of Iowa, February 17th, 1869, subscribed for one hundred shares of the capital stock of plaintiff corporation. The contract of subscription is identical with the one at bar, and was made at Fairfield, Iowa, one day after the contract of subscription in question. Mr. Stubbs, being in Chicago on other business, action was brought against him by plaintiff, in the Circuit

Court of Cook County, Illinois, to collect the amount of the assessment in question in this action. Among other defenses Mr. Stubbs pleaded that the cause of action was barred by the statute of Iowa. The plaintiff demurred to this plea, but the Circuit Court of Cook County, held the plea good, and this plaintiff took the case to the Appellate Court of Illinois, on writ of error.

Said Appellate Court, in its opinion, rendered October 15th, 1894 (not yet reported) held as follows:

"The plaintiff demurred. The Court overruled the demurrer and final judgment was rendered for the defendant from which this writ of error is prosecuted.

"Several other decisions of the Court below on demurrers, are assigned as error, but we only consider this one, as one good answer to an action is enough.

Leiter vs. *Day*, 35 Ill. App., 248.

"The plaintiff insists that as the promise was to pay, as in the Gray case, 122 Ill., 630, 'as the directors from time to time may order' and as the assessment was the same in this as in that case, therefore, the telegraph company being an Illinois corporation, the whole obligation of the defendant is measured, and the remedy governed by the laws of the state. Now in our view the cause of action arose upon the subscription. The order of the directors, had they made one, would have been, and the assessment which the Court did make, is, like the lapse of time where a note is payable ninety days after date, only the happening of the contingency upon which the promise is to be kept. In the case of the supposed note, the cause of action arises upon the note, and here upon the subscription.

"The statute is:

"When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.—Sec. 20, Ch. 84.

"The rule laid down in *McAllister* vs. *Smith*, 17 Ill., 328, that bills made in Illinois, payable on their face in New York, were governed by the laws of New York, was repudiated in *Adams* vs. *Robertson*, 37 Ill., 45, and it was held that the consequences of making those bills should have been determined by the law of this state.

"Our statute does not require that the laws of the state where the cause of action has arisen shall be just laws, but simply laws. Such laws may be, not statutory, but rules laid down by the highest Court of the state, and when the rights of parties are governed by them, we must follow the law of the state, whether like our own or not."

Chi. & N. W. Ry. vs. *Tuite*, 44 Ill. App., 535.

"A cause of action arises against a party where he is.

Hyman vs. *Bayne*, 73 Ill., 256.

"If the bar is complete there, it is here, whether we approve the law there or not.

"On demurrer we do not look outside of the plea, though as a matter of legal study we may know that in a case like this the Supreme Court of Iowa holds that the plaintiff cannot recover.

Great Western Telegraph Co. vs. *Purdy*, 83 Iowa, 430.

"Affirmed."

In the case of *Hawkins* vs. *Glenn*, 131 U. S., 319, followed by *Glenn* vs. *Liggett*, 135 U. S., 533, this Court held that the statute of limitations did not commence to run, as to subscriptions to stock, payable as called for, until a call, or its equivalent, had

been had. These cases were commenced in the Circuit Court of the United States, and came to this Court on writ of error. The case at bar was commenced in the District Court of the State of Iowa, and appealed to the Supreme Court of that state, and came to this Court on writ of error. The jurisdiction of this Court, therefore, depends upon the existence of a federal question, and not upon that of diverse citizenship. Further, in the case of *Hawkins* vs. *Glenn*, page 333, the debtor corporation executed a deed of trust, for the benefit of its creditors, and it has been ruled in Virginia, that the lien of such trust deed is not barred by any period short of that sufficient to raise the presumption of payment. The decision of this Court, therefore, in that case, was based to a great extent upon the laws of Virginia, as interpreted by the Courts of that state. Again, it has been decided by the Supreme Court of the State of Iowa, that if the unpaid balance due from a stockholder is more than his *pro rata* share, he must look to his fellow stockholders for contribution. Such fact is no defense to the creditor's suit. The whole unpaid balance may be collected from a stockholder, without a *pro rata* assessment, and he must look to his fellow stock-holders, in such case, for contribution.

Stewart vs. *Lay*, 45 Iowa, 614.

The facts in the case at bar are different from those in the Glenn cases, there being no trust deed

in this case, and there is also involved the question of a call made by the company in June, 1872, and the statute of limitations of Iowa.

The statute of limitations pertains to the remedy, and all suits must be brought within the time prescribed by *lex fori*. This action involves the construction of the statute of limitations of the State of Iowa, and such construction by the Supreme Court of said State will be regarded and followed by this Court. This statute, with the decisions of the State Courts thereon, constitutes a rule of property within the state, affecting even the title to real estate, as well as that to personal property. A suit for the recovery of real estate must be brought within ten years from the time the right of action accrued, or the title thereto will be absolutely vested in the occupying claimant. An action for the recovery of real estate sold for taxes, must be brought within five years after the treasurer's deed has been executed and recorded, or the title to property is vested absolutely in the purchaser.

Code of Iowa, 1873, Section 902;
McClain's Annotated Code of Iowa, 1888, Section 1388.

As shown above, the Supreme Court of the state of Iowa has construed said statute of limitations by a long and uniform line of decisions to the effect that if a demand be necessary, before the commencement of an action, such demand must be

made and the action commenced within the period fixed by the statute, for bringing the action. This Court has repeatedly held that the construction of a state statute, by the Supreme Court of the state, as in this case, will be regarded and followed by this Court.

Moores vs. *Citizens National Bank*, 104 U. S., 625;

Union Bank of Chicago vs. *Kansas City Bank*, 136 U. S., 223;

Bauserman vs. *Blunt*, 147 U. S., 647;

Miller's Executors vs. *Swan*, 150 U. S., 132;

Balkam vs. *Woodstock Iron Co.*, 154 U. S., 177;

Northern Pacific Railway Company vs. *Hogan*, 63 Fed. Rep., 102–105, and authorities there cited;

Railroad Company vs. *Baugh*, 149 U. S., 368–378;

Hough vs. *Railway Company*, 100 U. S., 213-226;

Railway Company vs. *Prentice*, 147 U. S., 101–106;

R. R. Co. vs. *Hambly*, 14 Sup. Court Rep., 983;

Section 721, Rev. St., U. S;

Marbury vs. *Kentucky Union Land Co.*, 62 Fed., 354–355.

By Section 721, Rev. St., U. S., it is provided that the laws of the several states, except where the Constitution, treaties, or statute of the United States otherwise require or provide, shall be regarded as rules or decisions in trials at common law, in the Courts of the United States in cases where they apply.

In the case of *Bauserman* vs. *Blunt*, *supra*, 147 U. S., 652, this Court said:

"No laws of the several states have been more steadfastly or more often recognized by this Court from the beginning, as rules or decisions in the Courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of the state, and as construed by its highest Court."

On page 654, this Court, speaking of the decisions of State Courts, which construe state statutes, including the statute of limitations of New York, said:

"These decisions upon the construction of the statute, are binding upon us, whatever we may think of their soundness on general principles. * * * * The Courts of the United States, in the absence of legislation on the subject by Congress, recognize the statutes of limitation of the several states and give them the same construction and effect which are given by the local tribunals."

In the case of *Balkam* vs. *Woodstock Iron Co.*, 154 U. S., 187–188–189, this Court held as follows:

"In the case before us, we think the rule under which we follow state statutes of limitations, and the construction of such statutes by the State Courts, compels us to treat the doctrine here announced, as conclusive of the present case, so far as this Court is concerned. The whole subject was fully reviewed by this court in the case of *Bauserman* vs. *Blunt*, 147 U. S., 647. * * * * Nor can the case before us be saved from the operation of the rule thus stated by the contention that the Supreme Court of the state of Alabama has mis-construed its statutes, or has adopted a rule of limitation or prescription in conflict therewith. * * * * The construction given to a statute of a state by the highest tribunal of such state, is regarded as a part of the

statute and is as binding upon the Courts of the United States as the text. * * * * These views meet every point presented and do not in any way conflict with *Burgess* vs. *Seligman*, 107 U. S., 20–32; *Carroll* vs. *Smith*, 111 U. S., 556–562, or *Gibson* vs. *Lyon*, 115 U. S., 439. None of these cases involved the question of the conclusiveness on this Court of the decisions of the Courts of a state as to the bar created thereby. * * * * When the bar of the statute of prescription, under the laws and decisions of the state of Alabama began to be operative, has been construed by the Court of last resort of that state. Necessarily, the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whether legal or equitable. Those questions were purely within the province of the Supreme Court of Alabama. In deciding them, it passed upon its own statutes of limitation, or the doctrines of prescription as applied by it, and we are obliged to apply and enforce their conclusions."

In the case now before this court, when the bar of the statute of limitations, under the laws and decisions of the state of Iowa began to be operative, has been construed by the Court of last resort of that state, and this Court, under the rule, will apply and regard such decisions as conclusive in this case.

In the case of *Union Bank of Chicago* vs. *Kansas City Bank*, 136 U. S., 223, 10 Sup. Ct., 1013, this Court said:

"The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest Court of the State, establishing a rule of property, are of controlling authority in the Courts of the United States."

The recent cases, above cited, in the 62d Fed. Rep. and 14 Sup. Ct. Rep., refer to the construction of the state statute of North Dakota, as to master's liability to servant, by the Supreme Court of that State, which construction was followed by this Court.

The Supreme Court of Iowa, in construing the statute of limitations of said State, held this action barred by the statute (R., pp. 90–91–92.)

IX.

THE ALLEGED UNPAID BALANCE, IN QUESTION, BECAME DUE AND PAYABLE JULY 12TH, 1872, UNDER CALL BY THE COMPANY, OF DATE JUNE 5, 1872, AND THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

On the 5th day of June, 1872, at a meeting of the proper officers of the company, special attention was called to the point of making a final call on all subscribers, and resolutions were passed, ordering all balances, unpaid by subscribers, for shares of capital stock of the company, due and payable on or before the 12th day of July, 1872, at the office of the company, in Chicago, and that the secretary notify the subscribers and demand payment. That the president or treasurer be authorized to collect, by legal means, all such balances due and unpaid after the 12th day of July, 1872. These resolutions

were duly entered of record in the record book of the corporation, on the 5th day of June, 1872, page 71, and signed by David A. Gage, President (R., pp. 84–85.)

By these resolutions, all unpaid balances were made due and payable on the 12th day of July, 1872. The right of action then accrued in favor of the company and against the subscribers. The company had done all in its power, and declared the balances due and payable at that date, and ordered their collection. The right of action was then complete. If notice to the subscribers were necessary, such notice was a mere preliminary matter, prior to the commencement of the action, devolving upon the company and its officers, and if they failed or neglected to give this notice, it was their own fault and would not stop the statute from running. The right of action accrued upon the call, and notice was not necessary to create the debt, and if necessary, was only a preliminary step to the commencement of the action. The statute then commenced to run from July 12th, 1872, and if the notice were necessary, it should have been given and the action commenced within five years from that date, or at latest within ten years from that date. The commencement of an action upon the call would have been sufficient demand or notice to the stock-holder, and the only question in such action would be, probably, whether the Court

would allow costs against the defendant, he not having been given an opportunity to pay before suit brought.

By the contract of subscription, the power to declare the unpaid balance due and payable at any time, rested with the company, through its officers. No notice to the stockholder, prior to the call, was necessary. The notice in such case is, not that a balance will be, but has been declared due and payable. At the time the balance was declared due and payable, the right of action accrued, and action could have been instituted then, at any time, and notice was not necessary to create a debt or cause of action. Notice is only preliminary to the commencement of the action and to give the stockholder an opportunity to pay, without costs. The statute commenced to run from the time the cause of action accrued, July 12th, 1872. When the technical right of action depends on the doing of some formal act by the plaintiff, as making a demand, he cannot, by failing to act, prevent the statute from running.

There is no provision either in the articles of incorporation or in the contract of subscription requiring notice to be given to the shareholders after a call has been voted, and no notice is necessary, and no demand is required, before suit.

Morawetz on Corp., 2nd Ed., Vol. 1, Section 147, page 147;

Illinois River R. R. Co. vs. *Zimmer*, 20 Ill., 658;

Am. & Eng. Ency. of Law, Vol. 23, pp. 810–811.

There is no evidence that defendant received formal notice of this call. If such notice were given it would be in the shape of a printed circular, by mail. The call was made in June, 1872, and this case tried to the Court below, in 1890, eighteen years after the call, and defendant could not recollect the fact of such notice. The presumption is that the officers did their duty and gave the notice. In any event, as above shown, the fact that no notice was given would not stop the statute from running. If the notice were necessary, it was the plaintiff's duty to give the notice, and plaintiff could not prolong the statute by delaying the notice.

For two years and three months after said balances were declared due and payable, the affairs of the company remained under the control of the officers, to-wit: until October, 1874. At that date the receiver took possession of the assets of the company, and it was his duty within the remaining two years and nine months, allowed by the statute, to give notice and commence this action. The unpaid balance had been due and payable for two years and three months when the record containing the resolutions making the call came into his hands, and he had the power and was charged with the duty adverse to defendant, to proceed to collect the unpaid balance within five years from July 12th, 1872. Suppose certain promissory notes, belonging to the company, and having matured, had come into his

possession at that time, and he delayed bringing suit thereon for eighteen years. Is it possible that he or the company could now maintain an action thereon; that the fact of his appointment, and the fact of the assessment having been obtained fourteen years later would have prevented the statue from running against the notes? Certainly not.

This action is based upon the same alleged unpaid balance declared due July 12th, 1872, and is certainly barred from the fact of these resolutions alone. The receiver was appointed October the 7th, 1874. He and the alleged creditors remained dormant and inactive for twelve years thereafter, until July 10, 1886, when the order of assessment was made, and even then, this action was not commenced until two years thereafter, in August, 1888. Fourteen years after the appointment of the receiver and eighteen years after the call.

The contract of subscription reads that "the balance shall be paid from time to time, as the directors may order" and certainly, under the contract, the balance can be ordered all paid at one time. The words at the top of the contract of subscription "Assessments not to exceed $10 on a share" do not change the body of the contract, and the Supreme Court of the state of Illinois, in the case of *The Great Western Telegraph Company* vs. *Gray*, 122 Illinois, 636, so often cited by counsel for plaintiff in error, expressly held that said words do not limit,

or in any way qualify the promises made by the subscriber in the contract. Under the contract of subscription in question, the whole amount can be called at one time.

Morawetz on Corp., 2nd Ed., Vol. 1, Sec. 146, page 147.

Furnald vs. *Glenn*, 56 Fed. Rep., 375.

Further, if it were true that a greater amount had been called than provided by the contract, it would be a matter of personal defense by a subscriber, when sued, and if he should see fit not to plead that defense no other person could object.

It is no valid objection to the call, that the same was made by the executive committee, when the contract of subscription reads that the call may be made by the directors.

The Articles of Incorporation of the company provide as follows:

"That the affairs of the company shall be managed and controlled by a board of directors, or trustees, and the said board of directors or trustees shall elect by ballot, from *their own body*, a president, vice president and *an executive committee of three*, upon whom they may devolve the exercise of such of their powers and duties, in the management and direction of the business, as they may deem best, etc. And said executive committee shall hold their office for one year, and thereafter until others shall be elected in their places and stead" (R., p. 21).

Here is an executive committee provided for by the Articles of Incorporation, elected by the board

of directors from their own number or body. The executive committee, therefore, was composed of the directors. These resolutions were duly entered of record at the date thereof, in the record book of the company, and the board of directors must have had knowledge of the passage of the resolutions at that time, the same being signed by D. A. Gage, president of the company, and in fact, the resolutions were passed by the board of directors, for the executive committee was composed of the directors, and the resolutions have never been objected to or rescinded. There is no doubt of the validity of the resolution, and neither the company nor its receiver should be heard at this date, twenty-two years later, to dispute the authority by which the same were passed.

Upon this question, in the case of *Railway Co.'s* vs. *Keokuk Bridge Company*, 131 U. S., 381, this Court said:

"When the president of a corporation executes in its behalf and within the scope of its charter, a contract, which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act."

Citing *Ind. Rolling Mill Co.* vs. *St. Louis, etc., R. R.*, 102 U. S., 256.

This rule applies with full force to the action of the executive committee, in making this call. The board of directors knew that the call had been

made. The executive committee was composed of the board of directors, and the board, never having dissented from the call, are presumed to have ratified the same.

If a call be not made by the proper officers, a stock-holder might object to the call for that reason. The company and its officers certainly could not, and the defendant stock-holder in this case is not making the objection that the call was not properly made. The corporation could not obtain a benefit by alleging that the deliberate acts of its officers were invalid. Further, the replication filed by plaintiff in this case, is a general denial that the call was made June 5th, 1872, as alleged in defendant's answer. There is no affirmative allegation by plaintiff, pleading the invalidity of or want of authority to make the call (R., p. 12).

Upon the issues joined, therefore, to-wit: A denial that the call was made, the evidence is undisputed that the call was made, and plaintiff cannot now be heard to assert its invalidity for any reason.

A call is nothing more than an official declaration that the sums subscribed are required to be paid.

Braddock vs. *Phil., Marlton & Medford R. R. Co.*, 45 N. J. Law Rep., 365.

All that is really necessary is that there should be some act or resolution, which evinces or shows a clear official intent, to render due and payable a part, or all of the unpaid subscription. These resolutions constitute a valid call or its equivalent.

CONCLUSION.

The claim sued upon in this action, bears the earmarks at least of suspicion, if not of fraud. The allegations are that the claims by the creditors of the corporation are for supplies, material furnished, etc., in the construction of the lines, and from the record, it is reasonable to conclude that the construction ended, at latest, with the decision of the Supreme Court of Illinois, in September, 1871, taking the affairs of the corporation from the control of its then officers. These claims must date prior to that time, and at the trial of this cause in the Court below, to-wit: 1890, were of the age of about twenty-one years. Is it possible that these creditors would remain quiet for twenty-one years from the time their claims accrued, and for fourteen years after the appointment of the receiver, before action was taken to collect said claims from the alleged stock-holders?

It is claimed in plaintiff's declaration, that judgments were rendered against the company for two hundred thousand ($200,000.00) dollars (R., p. 46), and in other proceedings to two hundred seventy-one thousand two hundred forty-nine dollars and sixty-two cents ($271,249.62) (R., p. 69.)

Joshua Stark, the last president of the company, and his partner, having a claim of six thousand six

hundred and forty-seven dollars and twenty cents, ($6,647.20) assigned to Mr. Charles Counselman.

Selah Reeve, having a claim of one hundred sixty-one thousand three hundred and thirteen dollars and eighty-five cents ($161,313,85). This Selah Reeve was one of the original incorporators of the company and at the beginning was a stock-holder to the amount of one hundred seventeen thousand eight hundred ninety-seven shares of the one hundred and twenty thousand shares of the capital stock. This Selah Reeve at this late date, appears as a creditor of the company, to the amount above mentioned.

It appears from the record in this case that prior to the 30th day of June, 1870, Reeve had built four hundred and seventeen and one-half miles of line, for which he had received one hundred and twenty-six thousand five hundred and fifty dollars and ninety cents ($126,550.90), and also the additional sum of twenty-five thousand ($25,000.00) dollars on work not completed (59 Ill., 254).

In the petition filed by the corporation against Reeve, for an accounting, in March, 1873, it is alleged that while the appeal in the Terwilliger case was pending in the Supreme Court, Reeve continued to sell stock, under said fraudulent contracts, and that, up to the date of the decree of November 16th, 1872, Reeve had sold under said fraudulent contracts, more than thirty thousand

shares at ten ($10.00) dollars per share, amounting to more than three hundred thousand ($300,000.00) dollars (R. p. 65).

Reeve and his associates, received about four hundred and forty-two thousand ($442,000.00) dollars. Some twenty years later, Mr. Reeve again appears on the stage, as a creditor of the company, to the amount of one hundred and sixty-one thousand ($161,000.00) dollars, in addition, and suits are brought to collect that amount from the alleged subscribers to the capital stock of the company. These facts warrant the inference that such claims are unjust and inequitable.

Respectfully submitted,

S. L. GLASGOW,

Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

TERM No. 105.

THE GREAT WESTERN TELEGRAPH COMPANY, ETC.,
Plaintiff in Error,

v.

HIRAM PURDY, *Defendant in Error.*

In Error to the Supreme Court of Iowa.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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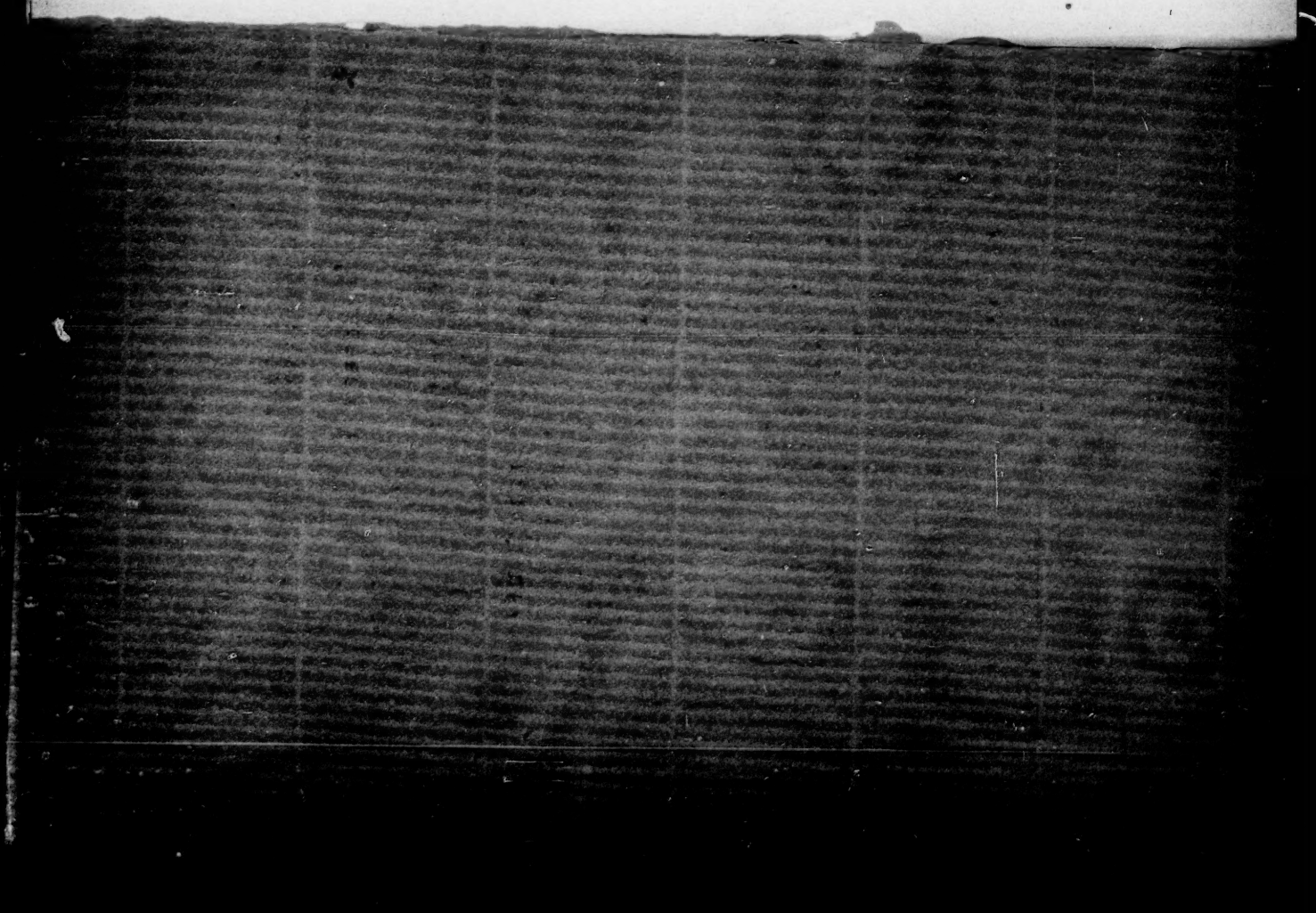

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We are obliged to make a short reply to the defendant's brief.

The Federal Question Fully Presented.

1st. The plaintiff's declaration or petition set out a cause of action by an Illinois corporation, with copy of defendant's contract, and attached to the petition was also a copy of the decree of assessment by the Illinois court, which created the right of action. It thus declared upon the contract and the decree of a sister State.

2d. As a part of the plaintiff's proof, it introduced in evidence the decree of assessment declared on. A decree of a court of general jurisdiction of the Illinois court was

thus fairly presented to the Iowa court, and entitled to receive full faith and credit.

The only evidence appearing in the record, as to the character of the copy of the decree actually introduced at the trial is the one attached to the plaintiff's petition, and shown in Record, pages 1–9. The original copy introduced was not copied into the record, and is only shown by reference to the copy attached to the petition (Rec., 12). This copy has only an attestation attached to it, as appears by the record (p. 9). It appears, also, by the record (pp. 12, 56), that a "*certified copy*" of the original decree was introduced, and without a recopying, the copy attached to the petition is referred to for its contents. It does not appear affirmatively, by description, except as the words "*certified copy*" might imply, whether the document introduced in evidence had a certificate of the Chief Justice of the Illinois Court attached or not. It seems, however, by reference to section 905 of U. S. Statutes, that the word "certified" has reference to the "certificate" of the Chief Justice, and not alone to the "*attestation*" of the clerk. The copy was, however, admitted in evidence, without any objection to it on the ground of insufficiency of verification, or on any other ground touching the character of the evidence. [In fact it was a complete copy as contemplated by Sec. 905.] As found in Record, p. 56, the only objection to its introduction was as follows:

"Defendant objected to the certified copy of the original decree of assessment in the Circuit Court of Cook County, Illinois, offered in evidence by plaintiff, for the reason that said decree is *incompetent*, *irrelevant* and *immaterial*, and for the further reason that it appears on the face of the decree that this defendant was not a party thereto. (Objection overruled and defendant excepted)."

This *so-called* objection was not under the practice of

Iowa, or by the ruling of this court, an objection calling for recognition as such.

Rindskopff Bros. & Co. *v.* Malone, 9 Iowa, 542.
White *v.* Smith, 54 Iowa, 233, 236.
Noonan *v.* Mining Co., 121 U. S., 400.
See plaintiff's brief, pages 12, 13, 14.

No cross-errors were assigned in the Supreme Court of Iowa by defendant on account of the introduction of this copy in evidence. Therefore, for the purposes of the trial it was conceded and admitted by defendant's counsel and the trial court that the document was a correct copy of what it purported to be. It was also thus treated and considered by the Supreme Court of Iowa. Therefore it is submitted that the decree of the Illinois court was sufficienty brought to the Iowa court's attention and fully in evidence to entitle it to constitutional protection.

Texas, etc., Ry. Co. *v.* Southern Pac. Co., 137 U. S., 54, 55.

Plaintiff thus presented to the Iowa court the decree, and impliedly the provision of the United States Constitution demanding faith and credit. Judgment was rendered against the plaintiff in the District Court and it assigned error in the Supreme Court (43, Error 2) because of such judgment, which was disregarded by that court, and it comes here assigning errors as found on pages 100 to 103 of the record.

It is submitted that the Federal question was thus fairly presented and that the judgments of both the District and Supreme Courts of Iowa, wore against the title, right, privilege and immunity claimed by the plaintiff and that such was the effect of such judgment.

That this right wa ssufficiently set up, and also denied, we cite

Roby *v.* Coleheur, 146 U. S., 153, 159, 160.
Dowell *v.* Applegate, 152 U. S., 327, 328,
and cases cited in our brief at pages 21, 22, 23

Discussion of Facts and Law.

At the trial of this case the defendant offered absolutely no material proof against the plaintiff's case.

He was shown to be not only a stockholder at the time the decree of assessment was rendered, and thus fully represented in the chancery suit as such, by the presence of the corporate entity, but he was at all times from nearly the commencement of the chancery suit an actual party thereto (Rec. 5, 15, 18, 39, 40, 87, 88).

The plaintiff introduced on the trial the defendant's contract of subscription, the decree of assessment (12), and the receiver's demand under it (13), and its case was made; though in fact the plaintiff did also affirmatively show that there was still an unpaid balance due on defendant's contract of $975, much more than called for by the decree, and also showed by the decree of November 16, 1872 (14) entered by the Illinois Chancery Court in pursuance of the opinion of the Supreme Court (59 Ill., 249), that the said suit continued to be a pending case after such decree, not only as to the company itself and Reeve, but all other parties, especially as they were not, by order, dismissed out of the suit. These proofs of plaintiff stood admitted in the case, as no objections, recognized by the practice of the Iowa courts, were interposed.

The defendant introduced the articles of incorporation of plaintiff (19), and the pleadings in the chancery case preceding the degree of assessment (23). These or any other proceedings in the chancery case previous to the decree, were ineffectual for any purpose, unless to give assistance to the plaintiff's case. Great Western Tel. Co. *v.* Mears, 154 Ill. 437. He introduced certain Reeve contracts (24–33, rebuttal, 41), which had been set aside by the Supreme Court of Illinois by its decision in 59 Ill., 249, and subsequent decree of November 16, 1872, in

pursuance of it. But this was litigation concerning matters between the plaintiff and its creditor, and did not concern the question of the power of the Chancery Court to collect in the unpaid balances due from the stockholders to pay the adjudicated debts of the plaintiff. If it was for the purpose of showing that Reeve was a stockholder, and the defendant not one, then we say the construction of those contracts and the decisions of the Illinois courts proved the contrary.

Terwilliger *et al. v.* The Great Western Tel. Co., 59 Ill. 249 *et seq.*

Mining Company *v.* Mining Company, 116 Ill., 177.

Bates, *et al. v.* Great Western Tel. Co., 134 Ill., 536.

He introduced a *so-called* supplemental bill—a simple proceeding in the chancery suit previous to the decree of assessment. It was not more effectual than the pleadings. If it was intended to prove by that bill that it was the institution of a new suit, it failed, for it was only, at best, a petition for receiver by stockholders previously made parties, and was intended to be, and was, a mere proceeding in the Terwilliger suit, and *so treated* by the *plaintiff*, and no other position can now be taken by the stockholder defendant then actually and constructively before the court. Calling this paper a supplemental bill does not make it one. "A rose by any other name would smell as sweet." It had none of the characteristics of a supplemental bill, and was not one, nor treated as one. It did not stop the Terwilliger suit nor suspend the accounting with Reeve, nor prevent the plaintiff from consenting, as it did, subsequently, in the same chancery suit, to the appointment of the receiver (35, 36, 74, 75). If it was introduced for the purpose of showing that by the filing of this supplemental bill a new suit was thus commenced in 1874, or two years after the general incorporation act of Illinois went into effect, and that hence

the assessment decree was invalid, not only as to defendant—a party to the Terwilliger suit—but as to all stockholders, because the stockholders in person were not all brought into court before the assessment decree was made, as the 25th section of that act seems to provide, then we reply that the Illinois act had, and has, no retroactive effect, and applied solely to corporations *to be* created in the future under it; and this was the intention of the legislature which passed the act, as construed by the highest court in Illinois, the only criterion upon this subject.

Wincock *v.* Turpin, 96 Ill., 135.
Stevens *v.* Pratt, 101 Ill, 219.
Great Western Tel. Co. *v.* Gray, 122 Ill., 630.
Bates *et al. v.* Great Western Tel. Co., 134 Ill., 536.

And the decisions in the last two cases had *sole* reference to the assessment decree now before this court. And the effect of this act is determined by the intention of the *law-making power* which enacted it, and not by the acts of individuals, nor by the filing of pleadings subsequently to the making of the law. If otherwise, the stability of the law is destroyed, and it becomes a foot ball in the often capricious, selfish, and dishonest hands of individuals. But illustration is not here needed. The plaintiff corporation, as well as all proceedings in the Terwilliger chancery suit, were protected from any effect from the incorporation act of 1872, by the repealing act, which excepted proceedings as to pending cases in court, and corporations already organized, which included the plaintiff, as well as the Terwilliger chancery suit then pending; though as a matter of fact the Supreme Court in the Gray case (122 Ill.) principally rested its decision exempting the plaintiff from the operation of that law, upon the fact of its previous organization. So that whether we treat the *so-called* supplemental bill as a new suit, or as

a proceeding in an old one, this corporation is not affected by the law of 1872, nor was it, nor could it be necessary under any circumstances that either the defendant or the other stockholders should be personally present in the litigation, *in addition to the plaintiff corporation*, when the decree of assessment was rendered, to bind him and them completely, so that no contradiction as to the validity and binding force of the same, either in that suit or in any subsequent *law action* brought to enforce the same could ever lawfully be tolerated.

The defendant also introduced in evidence a bare resolution of the board of directors of the plaintiff, found on the books of the plaintiff, of date June 5th, 1872 (37–84). This was, as an isolated piece of evidence, immaterial, and did not show that a cause of action had thereby accrued to the plaintiff, so as to start the running of the statute of limitations of Illinois, or any other State; and the Supreme Court of Iowa admitted it in its opinion, now here for review. We have made further reference to this hereinafter.

The defendant also introduced in evidence a transcript of certain proceedings begun in the Circuit Court of Polk County, Iowa, August 15, 1882, and transferred to the United States Circuit Court, a few days after, and in which the receiver of the plaintiff had been joined as party plaintiff with certain creditors of the plaintiff, and in which defendant Purdy, with certain other stockholders, were defendants (38, 80, 81). But it was shown beyond contradiction, by the orders of those courts, and testimony, that the case was conducted without the knowledge or consent of the receiver, and that his name was improperly joined, and the case was dismissed as to him within a few days after its commencement (Sept. 4, 1882), and before its removal to the United States Court (Rec., 40). Furthermore, the suit was dismissed as to Mr.

Purdy, so that he was not obliged to, and did not then, pay any part of the unpaid balance due upon his subscription contract (Rec., 83). It is very clear, therefore, that this unauthorized litigation, wrongfully begun and conducted by creditors in a foreign jurisdiction, without the knowledge, consent, or presence of the plaintiff or receiver, and really in contempt of the Illinois court, before which all the creditors had proved their claims, and which was alone empowered to collect the assets, including the unpaid balances due from the stockholders, and distribute the same ratably among all of the creditors, *could* have no effect upon the decree of assessment, or the rights thereunder in this action against the defendant.

Such was the case, and the only case made upon the trial by the defendant. To employ a term once used by this court, it did not amount to the force of a "*spider's web.*" The Supreme Court of Iowa conceded this, and refused to allow its decision to rest upon any of these alleged defenses.

The only facts, therefore, left, was the complete case, and right to recover, established by the plaintiff, with its unassailable decree of assessment, and the further fact, which no one contested, that previous to the assessment by the Illinois Chancery Court, the officers of the plaintiff company, the defendant's own agents, had never previously made any valid order of assessment, according to the terms of the subscription contracts.

Upon this *sole* ground the Iowa court assumed to construe the contract of subscription, and the rights of the plaintiff thereunder, and to hold that a right of action accrued to the plaintiff upon the making of the contract, to at once sue for, and recover, the whole amount called for by its terms, notwithstanding it provided for payment only in instalments, and notwithstanding the decree of assessment of the Illinois Chancery Court, a court of

the *domicil* of the plaintiff, with full jurisdiction of the plaintiff and defendant, and the creditors who were there bound to seek the relief accorded to them, had settled, as against this stockholder defendant, the jurisdiction of the court, and validity of the decree, the construction of the defendant's contract of subscription, and the right and liabilities under it, and also the mode of enforcing the same, and the further important fact that no valid assessment or call had previously been made, and also, that the officers of the company plaintiff had been guilty of no previous laches in failing to call in the amounts due by the contracts of subscription.

This court said in Hawkins *v.* Glenn, 131 U. S., 339, that "As between the stockholder and the corporation it does not lie in the mouth of the stockholder to say in response to the attempt to collect his subscription for the payment of creditors, that the claim is barred, because the company did not discharge its corporate duty in respect to its creditors earlier." And it is now most earnestly insisted that the Iowa court had no authority, under the constitution and laws of the United States, to raise up for this stockholder defendant who happened to be sued in its jurisdiction, a defence which seems to us entirely colorable, and to which he is not, either equitably or lawfully entitled, as it has done by its decision. Nor has that court authority to decide either by its own laws or decisions, the questions decided by the Illinois court, and involved in its decree of assessment. That all of the stockholders of the plaintiff are integral parts of it, and upon the same plane of rights and liabilities seems beyond question. That their contracts of subscription, which create them stockholders, are made with reference to the laws of the State of the corporation's domicil, and that the rights and liabilities arising thereunder are

to be determined *solely* by the courts of such domicil, seems equally beyond question.

This court said in the Hawkins-Glenn case (131 U. S., 332) and concerning the decree there under consideration, which was like the one here, that the decree of the Virginia court "determined its validity" and, of course, that it created a cause of action against the stockholder wherever sued; and in referring to the decision of the highest court of that State, approving that decree, this court further said:

"We *concur* in the decision to this effect of the highest tribunal of the State, where the corporation dwelt, in reference to whose laws the stockholders contracted * * * and in whose courts the creditors were obliged to seek the remedy accorded" (331–2), * * * citing in support of this position Patterson *v.* Lynde, 112 Ill., 196, and wherein creditors of an Oregon corporation were refused the use of the Illinois courts to pursue stockholders of such corporation for the recovery of unpaid balances due upon their subscription contracts for the payment of such creditors. And it is insisted here that this faith and credit, due to the decree of the Illinois Chancery Court, shall in no measure be shaken by the character of the decree, whether we call it final or interlocutory; for under the numerous decisions of this and other courts, such a decree can not be assailed by the stockholder, either in the original or collateral action, and hence for the purposes of its enforcement against such stockholder, it has all of the attributes of finality; and I submit that by the consensus of judicial opinion it is protected under the provisions of the United States Constitution.

As to the decree of assessment of the Virginia court against the stockholders of the National Dispatch and Transportation Company, and its binding force in all courts outside of Virginia upon such stockholders, the Su-

preme Court of Virginia, in Lewis' Admr. *v.* Glenn, 84 Va., 988, referring to the decision of the Maryland Supreme Court, holding the stockholder in that sister State bound by the decree, said:

"Such was held to be its effect in Glenn, Trustee, *v.* Williams, *supra*, and in numerous other decisions, State and Federal, and the same effect will doubtless continue to be given to it in every jurisdiction in which it may be called in question. This is saying but little when we reflect that the Constitution of the United States requires that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." And in Semple *v.* Glenn, 91 Ala., 245, the Alabama Supreme Court said as to the same decree: "It may be that the record and proceedings abound in errors and irregularities, but the decrees are not void; and we are bound to accord to them the same faith and credit they have by law and usage in the courts of Virginia." And in Lehman, Durr & Co. *v.* Glenn, 87 Ala., the same court also said, that "the decision is binding upon us. It can not be collaterally attacked. If erroneous it should have been corrected on direct appeal." In Glenn *v.* Williams, 60 Md., 121, the court said: "The decree appears to stand unreversed, and as the court had jurisdiction of the parties and of the subject-matter, before it, the court of this State would not be at liberty to go behind that decree." And at the time of this decision in the Glenn-Williams case the unreversed decree had not been considered in the Supreme Court of Virginia.

The list of cases to which I cite the court's attention on this point are the following:

Kennedy *v.* Gibson *et al.*, 8 Wall., 505.
Sanger *v.* Upton, 91 U. S., 56, 58.
Glenn *v.* Williams, 60 Md., 121.
Hamilton *v.* Glenn, 72 Md., 342–3.

Lewis' Admr. *v.* Glenn, 84 Va., 988.
Lehman, Durr & Co. *v.* Glenn, 87 Ala., 626.
Semple *v.* Glenn, 91 Ala., 245.
Hawkins *v.* Glenn, 131 U. S., 329–332.
Glenn *v.* Liggett, 135 U. S., 548.
Dowell *v.* Applegate, 152 U. S., 327

In the very nature of the case, and of these valid chancery proceedings, no other decree of a different character could be taken into the courts of Iowa or other States than that of the domicil, for the enforcement of the payment of the assets or unpaid balances in the possession of stockholders, there living; and if, in the courts of those States, no faith and credit is due to such decree, then it can be, and probably will be, there disregarded; and the stockholders everywhere, except in the State of Illinois, will escape the burden of furnishing their equal contribution to payment of the plaintiff's adjudicated indebtedness; and the equal liability of all stockholders of this single corporation which the law contemplates, and the principle of which the courts are constantly asserting, and which is well expressed in the Gray case in 122 Ill., would be destroyed and annulled through the medium of the courts themselves. The stockholders of the plaintiff living in Illinois, and the receiver in their behalf, have the right to be concerned at the prospect of any such proposition being established.

It will be noted that the decree of assessment against the stockholders of the Great Western Telegraph Company by the Illinois Chancery Court was rendered on the 10th day of July, 1886, and that the demand was made on the defendant the 29th day of August, 1889, and this action commenced on the 30th of August, 1889, which was only a little over three years subsequent to making of the decree, and only one day after the right of action accrued against the defendant under it, as the decree or-

dered payment by the stockholders "upon the demand of said receiver or his agent." Thus no Statute of Limitations of ten years, or any other time, either of Iowa or Illinois, had had time to run so as to operate as a defense on behalf of the defendant.

It has been suggested that the plea of limitations is a plea of payment, and that it admits that the right of action accrued as alleged, but interposes that the amount has been paid. Conceding that to be true, yet as a plea of payment it is only so by construction or presumption, and it must clearly appear by the pleadings, and the plea must be responsive and set up a period, which is sufficient when measuring from the time when the right of action accrued, to that when the action was commenced, but when, as here, the declaration or petition shows the right of action to have just accrued, a plea of the statute does not meet the plaintiff's case, as stated, and makes no issue as to limitations, and when the court, at the trial, disregards the decree of assessment declared on and produced in evidence, and refuses to regard it as valid, and goes back of it, and allows this plea to apply as a defense in behalf of the stockholder defendant on account of the alleged laches of his own officers, and despite the scope of the decree, and its conclusive rebuttal of any such pretended payment by delay of such officers, it thereby denies to such decree the full faith and credit to which it is entitled under the Constitution; and its decision rests upon nothing else but such denial of faith and credit, and is not broad enough to sustain its judgment, independent of the Federal question; and it is submitted that if such decisions as this of the Iowa court can be safely and successfully rendered, to the protection of the stockholders in that State, without the invasion of the rights guaranteed by the United States Constitution, then, I submit, that something is wrong with the condition of the law; and in

order to determine how far a corporation can be fairly given credit on the strength of the unpaid balances the examination need hereafter therefore only go to an enquiry concerning those stockholders living in the State of the domicil, for the rest will surely escape in case of insolvency.

It seems to me that the case of Dowell *v.* Applegate, 152 U. S., 327, recently decided by this court (opinion by Mr. Justice Harlan), is here, in principle, directly in point. In that suit, brought in the State court of Oregon, the defendant had set up in his answer and relied upon a decree of the Federal court which he introduced in evidence. This court said, page 334: "The answer of Dowell in the present suit, * * * bases his claim upon the decree of the Federal court and the sale under it at which he purchased," and at page 335, 336 said:

"From this history of the litigation between the parties, it appears that Dowell, in his answer in this suit, asserted his right to the forty acres in dispute under and by virtue of the decree and proceedings in the Circuit Court of the United States. That right having been denied by the judgment of the Supreme Court of Oregon, affirming the judgment of the Circuit Court of Douglass County, it is necessary to enquire.

* * * * * *

"Secondly, whether if such decree and proceedings were not void, the State court gave due effect to them, when adjudging that Dowell took nothing by his purchase of the lands in dispute under that decree.

"If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under the authority of the United States."

And this court further said, page 341: "Upon what principle can it be held that that decree, being unmodified and unreversed, does not conclude the parties to the suit in which it was rendered." * * *

So in the present case; the plaintiff set up an unreversed decree of the Illinois court, which was conclusive upon the defendant, and established the right to judgment, if its legal effect had been accorded to it. The decree recited jurisdiction and all other important facts essential to its validity. It proved itself, and could not be contradicted in this action when thus used as evidence in a collateral proceeding.

Bowen *v.* Bond *et al.*, 80 Ill., 355.
Barnett *v.* Wolf, 70 Ill., 80.
Swearington *v.* Gulick *et al.*, 67 Ill., 210.
Freeman on Judgments, Sec. 330.
Prescott *et ux v.* Fisher *et al.*, 22 Ill., 393.
Phillips *v* Webster, 85 Ill., 148.
Lamb, Assignee, *v* Lamb, 6 Bissell, 424.
Glenn *v.* Williams, 60 Md., 93.

In the Dowell suit the *defendant* set up and relied upon a decree of the Federal court; but its legal effect was denied by the Supreme Court of Oregon, and this court reversed the judgment of the *Oregon* court. In the case at bar the *plaintiff*, in the Iowa court, to sustain its right of action, set up and relied upon the decree of a competent court of the sister State of Illinois. Its legal effect was there denied and the plaintiff was defeated, and could have been defeated in no other way; and it is submitted that the judgment of the *Iowa* court should be reversed.

We further reply to brief of defendant's counsel.

1. As to His Points and Arguments on Pages 26 to 33, and 47 to 78 Inclusive.

We have already herein answered these points, but see plaintiff's brief, pages 4 to 9; also Authorities on pages 26–7.

All stockholders of the same corporation must be upon

the same plane, and their contracts of subscription and liability of the same character.

The corporation being of Illinois, its contracts of subscription, which constitute the stockholders, its *integral* parts, are *Illinois* contracts, and to be construed by the *Illinois* courts and payable at the domicil of the corporations (Illinois), and enforced through the courts of the domicil (Illinois.)

When the Illinois court made the assessment upon stockholders living in a dozen States, as the declaration avers, it was not dealing concerning contracts of a dozen different kinds, but with stockholders bound to it and made a part of it, in the same manner, and by the *same kind* of contracts, as the declaration avers.

The Supreme Court of *Iowa* has no authority to determine when the right of action accrues upon these contracts, as against the decision of the Supreme Court of the domicil of the corporation whose stock is thereby subscribed for, *or adversely to the terms of the unreversed decree of assessment of the Illinois Chancery Court.*

"In Hamilton *v.* Glenn, 72 Md., 350, which was an action at law, under an assessment decree by a Virginia court against the stockholders of a Virginia corporation, and upon contracts of subscription similar to those signed by the stockholders of The Great Western Telegraph Company, including the defendant, the Maryland Supreme Court, recognising the true character of the contracts of subscription to the stock of the Virginia corporation, said:

"'*The original subscription to the stock of the corporation, in respect of which the defendants are sued, was a Virginia contract, and had reference to the law of Virginia, existing at the time, as to the nature and extent of its obligation.*'"

In Hawkins *v.* Glenn, 131 U. S., 331–2, the court said:

"*We concur in the decision to this effect of the highest tribunal of the State where the corporation dwelt, in reference to*

whose laws the stockholders contracted (Canada Southern Railway Co. *v.* Gebhard, 109 U. S., 527), *and in whose courts the creditors were obliged to seek the remedy accorded.* Barclay *v.* Tallman, 4 Edw. Ch., 123; Bank of Virginia *v.* Adams, 1 Parsons' Sel. Cas., 534; Patterson *v.* Lynde, 112 Ill., 196."

And further said (332):

"*The decree of the Richmond Chancery Court determined the validity of the assessment.* * * * *The court may have erred in its conclusions, but its decree can not be attacked collaterally, and, indeed, upon a direct attack, it has already been sustained* by the Virginia Court of Appeals. Hamilton *v.* Glenn, *supra.*"

Recognizing this same obligation, as to faith and credit, the Supreme Court of Maryland, in Hamilton *v.* Glenn, 72 Md., 342–3, said:

"All that each individual stockholder could insist upon was, that the assessment should be equal and uniform upon all the stock alike, and that it should not exceed what was required for the payment of the debts of the company. *But these were questions for the Chancery Court of Virginia, and they have there been finally determined and adjudicated upon by the decree of December 14, 1880, and there is no power in this court to review that decree.*"

In Lewis' Admr. *v.* Glenn, Trustee, 84 Va., 988, referring to the Glenn decree, and to its decision, that it bound and concluded every stockholder, said:

"*Such was held to be its effect in* Glenn, Trustee, *v.* Williams, *supra, and in numerous other decisions, State and Federal, and the same effect will doubtless continue to be given to it in every jurisdiction in which it may be called in question. This is saying but little when we reflect that the Constitution of the United States requires that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and that the act of Congress providing for the mode of authenticating such acts, records and*

judicial proceedings, declares that, when authenticated as provided, they shall have such faith and credit given to them in every court within the United States, as they have by the laws or usage in the courts of the State from which they are or shall be taken."

In Lehman, Durr & Co. *v.* Glenn, 87 Ala., 626, the *Alabama* court said: "The *Virginia* court decided that this service [upon the corporation alone] was sufficient to give jurisdiction [to make the decree of assessment]; and that decision is *binding* upon *us*. It can not be *collaterally attacked*. If erroneous, it should have been corrected on direct appeal."

In Kennedy *v.* Gibson *et al.*, 8 Wall., 505, the court applied the same doctrine to a case similar in principle, and declared that the validity of the assessment "is not to be questioned in the litigation that may ensue."

Counsel cites Bennett *v.* Great Western Tel. Co., 53 Ill. App., 276 to 282 (p. 61), in which that intermediate Appellate Court has seen fit to deny the validity of this decree. That court is not (by statute) an authority, except in the individual case decided. The decision is erroneous, upon its face, as questioning collaterally for mere *error*, a decree of another court of general jurisdiction. It was also an attempt to reverse the decision of the highest court of the State (G. W. Tel. Co. *v.* Gray, 122 Ill., 630), which decision was authority and should have been adhered to, instead of being disregarded by the lower court. The same Appellate Court (2d Dist.), in the said Gray case, had also on a former occasion declared the decree invalid upon another ground. It was, however, as seen, reversed by the Supreme Court of the State.

This decision of the Bennett case takes as its guide the case of Great Western Tel. Co. *v.* Burnham, decided by the Supreme Court of Wisconsin, of which that court, in a law action, unjustly refused to accord faith and credit

to the same decree of assessment when sought to be enforced in its courts, declaring it *void* for *mere error*, while admitting the power of the Illinois Chancery Court to make an assessment in the suit. It is hoped this Wisconsin decision will be reviewed by this court in due time. It is submitted the decision of the Wisconsin Supreme Court is erroneous, upon settled principles, and in direct conflict with the ruling of the court which made the decree, and of the Supreme Court of Illinois in the Gray case (122 Ill., 630) which approved the decree, and which the Appellate Court of Illinois in the Bennett case should have followed, rather than a decision of a foreign court.

The decree of assessment of the Chancery Court of Illinois determined its validity, thus protecting it from future lawful attack.

Voorhees *v.* U. S. Bank, 10 Peters, 471.

Hollins *v.* Brierfield Coal & Iron Co., 152 U. S., 371, 380.

Dowell *v.* Applegate, 152 U. S., 327,
and cases before cited.

In Glenn *v.* Spring, 26 Federal Reporter, 494-5, in passing upon the scope of the decree of assessment introduced in evidence in that case, the court said:

"Now the decree is decisive, *first*, as to the fact that there was no *laches* upon the part of the corporation or its trustees previous to the signing of the decree; *secondly*, as to the statute of limitations; *thirdly*, as to the existence of *bona-fide* debts against the company; *fourthly*, as to informalities in the incorporation; and *fifthly*, as to the want of power in the trustee to make the call. Mor. Corp., 144, 145; Upton *v.* Tribilcock, 91 U. S., 45, 55." All these defenses are precluded by the decree. * * *

Also to same effect, see Lehman, Durr & Co. *v.* Glenn, 87 Ala., 627, and cases cited.

The decree of the Illinois court is presumed to be in conformity to the laws of the State, and should govern, and the stockholder defendant was and is precluded from going back of it for a defense against it.

The Supreme Court of Illinois has already determined the laws in that State, as it is settled in this court and everywhere else, that the statutes and decisions of the courts of the domicil of a corporation govern as to the liability upon the contracts of subscription to capital stock, and the methods of reaching the unpaid balances, for the payment of the corporate debts.

Patterson *v.* Lynde, 112 Ill., 574.

And this decision has been followed in several cases.

See also:

2 Black on Corp., §546. Also, §569, page 219–20.

Hawkins *v.* Glenn, 131 U. S., 331–2

Glenn *v.* Liggett, 135 U. S., 533.

In 2 Beach on Priv. Corp., pp. 219–20, Sec. 569, the author's language is as follows:

"In the case of a call by the court, no previous call having been made by the corporation, the Statute of Limitations does not begin to run against the stockholder's liability on his subscription until the date of the decree ordering the assessment. For, as between the stockholder and the corporation, it does not lie in the mouth of the stockholder to say, in response to the attempt to collect his subscription for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier.

"Although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he can not be allowed to insist that the amount required to discharge him, became instantly payable, though unascertained, and though there was no request or its equivalent for payment? *The law of the State creating the* corporation governs the rights of

its stockholders and creditors, and the statute of another State, prescribing a different period of limitation, can have no application to an action brought in that State to enforce the decree ordering the assessment."

In Patterson *et al. v.* Lynde *et al.*, 112 Ill., 196, the action was against Cable and Lynde—residents of Illinois—by creditors of an Oregon corporation, and to recover, for the payment of their claims, the unpaid balances due upon the subscriptions of the defendants to the stock of such Oregon corporation. The Circuit Court of Cook County, Illinois, sustained a demurrer to the complainant's bill.

The Supreme Court said (page 206), as to the law of what State should govern the liability of the defendants under their subscription contracts, as follows:

"Here, whether the liability of the defendants exists or not, depends not upon the law of Illinois, but upon the law of *Oregon*, and it has been seen by the quotation from the opinion in Patterson *v.* Lynde, *supra*, that the liability is held by the Supreme Court of Oregon to be in equity, and not at law, so that the rights of the corporation, the stockholders and all the creditors can be adjusted in one suit."

This court further said on page 208: "The contract of subscription here sought to be enforced is a contract made and intended to be performed in the State of Oregon. We must, therefore, in respect to its *validity*, its *interpretation* and its *effect*, resort to the *law* of *that State*."

The laws of the domicil of the corporation govern all contracts made with such corporation. The residence of the person of the stockholder does not change the rule.

Spelling on Corporations, § 913.

To the same effect is:

Young *v.* Farwell, 28 N. E. (Ill.), 845.

Samson *v.* Fowler, 44 Ill. App., 186.

Schertz *v.* First Nat'l Bank of C., 47 Ill. App., 124

In the Young-Farwell case, the court quotes the language of the Supreme Court of Massachusetts in New Haven Horse Nail Co. *v.* Linden Spring Co., 142 Mass., 34, 37, as follows:

"Where the rights sought to be passed upon and determined are those which arise from the relation between a corporation and its members, they depend upon a local law which exists at the place of its creation, and true policy would seem to require us to leave them *there* to be determined. * * * The liability which the stockholders are alleged to be under to the corporation, and its creditors, has little analogy to a demand for a debt due, according to the general recognized principles of the law. It is of a peculiar character involving the organic law by which the corporation is created and requiring local administration."

And the court proceeded to say:

"We have heretofore in similar cases declined to pass upon them, and determine the relation existing between a foreign corporation and its members, and the obligations arising therefrom."

The Supreme Court of Illinois has authoritatively settled by its many decisions, including that in the Gray case, the point of time when the Statute of Limitations begins to run on the subscription contract of defendant and the other stockholders of plaintiff.

Counsel misconceives entirely the decisions of this court in Hawkins *v.* Glenn, Glenn *v.* Liggett, and Glenn *v.* Marbury, as referred to by him on page 32 of his brief. In these cases the court allowed no defense which reached back of the decree of assessment. The court in those cases substantially held that if the defendant was a stockholder, with an unpaid balance, he had no defense as against the decree, in the action at law.

In Glenn *v.* Williams, 60 Md., 93, the case was an ac-

tion like the present, upon a decree of assessment, by the Chancery Court of Virginia, for the payment of the debts of a corporation, and the corporation only was before the court, when the decree was entered. The court said (122):

"It is for the amount of the assessment made, that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for, and it is only from the time of the asssesment and call, that the statute runs in favor of the defendant. This is the settled doctrine upon the subject, and it has been fully recognized and approved in this court. Balto. & H. Turnpike Co. *v.* Barnes, 6 H. & J., 57; Salisbury *v.* Black's Administrator, *Ib.*, 293; Taggart *v.* West Md. R. Co., 24 Md., 563; West R. Co. *v.* Avery, 64 N. C., 491; P. & C. R. Co. *v.* Plummer, 37 Pa. St., 413."

And the court further said (123):

"Here the defendants were *only bound* to pay upon a general assessment made upon all the stock subscribed, and only for the purpose of paying off the liabilities of the corporation. Until it was ascertained what amount, and what proportion of the unpaid subscriptions, would be required to discharge those liabilities, no assessment could be made; and until then, his obligation to pay as to time and amount, was not fixed and determined. It was only from the time of the assessment made, by the decree of the court of Virginia, that the statute of limitations began to run, and it was only from that time, or the time of demand, made of the defendants for payment of the assessment, that the right of action accrued to the plaintiff as trustee."

In the *Glenn-Williams* case, the subscriptions were payable, as provided by the statute, "as required by the president and directors." In the case at bar, they are provided, in the contract of subscription, to be payable according to the "orders of the board of directors." In

Virginia, the statute, by implication of law, became a part of the contract of subscription, while in the case at bar, the provision for payment was incorporated in the contract itself. Thus, the two contracts are similar.

In Scovill *v.* Thayer, 105 U. S., 143, the court said:

"It is well that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. * * * * And it is clear the statute of limitations does not begin to run in his favor, until such order or demand."

Reply to Point 5 and V on page 33 and 71, et seq.

The decree of November 16, 1872 (Rec. p. 15–17), did not determine the Terwilliger case either as to defendant or the company as asserted on page 33. That decree provided for an accounting with Reeve, a main defendant, and for the possible appointment of a receiver. The cause continued, and the *plaintiff company* itself, afterwards, on October 7, 1874, stipulated and consented to the appointment of a receiver, as set forth in the Gray case and also in the decree of assessment; and this *consent* carried with it the consent of *every stockholder* including defendant Purdy, and creates a perfect estoppel against him to those proceedings.

The filing of the supplemental bill referred to by defendant's counsel in his brief (p. 36) did not change the character of the proceedings. The filing of that supplemental bill or petition did not prevent or affect the appointment of the receiver *by stipulation*. The plaintiff was at perfect liberty to stipulate for the appointment of the receiver in the Terwilliger chancery suit independent of that petition, and such stipulation was binding on all of the stockholders, including defendant.

Reply to Points 6 and VI, pages 37 and 78–81.

The laws and decisions there referred to have no application to the plaintiff corporation or to any proceedings touching it or its affairs, as distinctly decided in G. W. Tel. Co. *v.* Gray, 122 Ill., 630 *et seq.* See plaintiff's brief, page 6. See also the foregoing.

Reply to Points 7 and VI, pages 37 et seq. and 81–83.

The decree itself is its best voucher and proves its binding force under the law, as well as upon the corporation present at the time it was rendered, as upon the stockholders then present or absent, when sought to be enforced in the law actions. The cases cited are not applicable. Every decree, from its very nature, is binding upon parties and privies, and the fact of its rendering establishes it,—the jurisdiction appearing. The decisions of the courts of Illinois also affirmed its validity. See cases hereinbefore cited.

If measured by the decisions of the Supreme Court of Iowa itself, rendered previous to the opinion in this case, this decree of assessment, if rendered in an Iowa court, would there have been held conclusive upon a stockholder in a collateral action brought to enforce it.

See Chandler *v.* Keith, 42 Iowa, 99.

Stewart *v.* Lay, 45 Iowa, 612.

Schoonover *v.* Hinckley, 48 Iowa, 85.

But neither the courts of Iowa, nor the laws of Iowa, can be lawfully utilized to question or nullify the decree of assessment, or determine the rights and liabilities arising under the subscription contracts. The courts of Illinois are alone the authorities upon these subjects. That State being the home of the plaintiff, in respect of whose laws the stockholder contracted to become such, and in whose courts the creditors were bound to seek all relief accorded.

Hawkins *v.* Glenn, *supra.*

Reply to Points 8 and VIII, Pages 38 and 83.

The Supreme Court of Iowa did not pretend to apply the Statute of Limitations of Iowa to the right of action accruing by the decree of assessment, but denied that any cause of action accrued by that decree, and assumed to apply the statute because of the fact that the defendant's own officers had not made a valid call for more than ten years before action against defendant, and upon its own construction of the character of the contract of subscription, and as to when the right of action could accrue upon it, which construction it was not authorized to make, and which was proved to be an incorrect construction by the decree of assessment itself, *which settled* the fact that no valid assesment had previously been made, and that the power of the court to make it had not lapsed by any negligence of the officers or by any peculiar terms in the contract.

The plea itself did not meet the declaration of plaintiff, which was the sole cause of action, and was not responsive; and the court raised its own defense for the defendant independent of the pleadings.

The Iowa cases cited by counsel, have no reference to the statute as applied to attempts on the part of the corporation to collect the unpaid balances for the payment of its debts, but to dissimilar cases, where an entirely different rule applies, as well recognized by this and other courts.

The case of a creditor proceeding directly against a stockholder, for an unpaid balance, and the case where the creditors have proved their claims in the chancery court of the domicil, and must await the collection of the unpaid balances, through the corporation itself under the direction of the court, afford entirely dissimilar applications of the Statute of Limitations;—in the one

case, the statute running against the creditor, when his claim has matured against the company, or judgment has been rendered against the company, and in the other, the statute running from the time of demand under the decree of assessment. This is too well settled to require reference. Counsel quotes a recent decision by one of the Appellate Courts of Illinois, namely, Great Western Tel. Co. *v.* Stubbs. This decision is not an authority even in Illinois, and is unexplainable. It is in the teeth of the decision of the Gray case in 122 Ill., rendered upon the same kind of contract, and disregarded the settled rule as to the peculiar character of stock liability, and as to when the right of action accrues upon a contract of subscription. If the Gray case is authority, then the Stubbs case is not. This decision of the Appellate Court of the First District startled the bar of Illinois, and the National Corporation Reporter published at Chicago, after publishing the opinion of the court, appended thereto the following pertinent words:

"This case, upon a bare reading of it, seems to be erroneously decided so far as the statute of Iowa is held to be a bar to the subscription contract. Is a foreign statute of limitations available, in an Illinois court upon a contract of subscription in favor of an Illinois corporation, *followed by a valid decree of assessment?* It would seem that the mere statement of the proposition is self-condemnatory. The contracts of subscription of a corporation must be held to have been incurred according to the laws of the home State, and in whose courts alone the creditors of the corporation must seek their remedies.

"The exact question was decided in Glenn *v.* Liggett, 135 U. S., 331, where it was ruled that the rights of the parties must be adjudicated according to the requirements of the statutes, and the jurisprudence of the State which created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made.

Can the subscriber to an Illinois corporation, living in Iowa, allege that the laws of his domicil shall govern, on the mere allegation that the contract was made in Iowa? It is the law of the corporation's domicil, and *not* the subscriber's domicil which governs the question. Spelling, Corporations, Sect. 913; Beach, Corporations, 569."

This decision in the Stubbs case is also directly opposed to the position of this court announced in Hawkins *v.* Glenn, 131 U. S., 334.

The court in this Stubb's case also held that the cause of action upon the defendant's contract arose in Iowa, and not in Illinois, the domicil of the corporation, and contrary to the uniform holding of the courts

And again, which seems most unexplainable, the same Appellate Court, in the Stubbs' case, and directly in the teeth and contrary to the decision of the Gray case, said "*Now in our view the cause of action arose upon the subscription.*" No one can defend or excuse the Appellate Court of Illinois for rendering this opinion.

The case has been appealed to the Supreme Court of Illinois, where it will receive a decision in conformity to its former decision in the Gray case, which will necessarily be a reversal, and a reannouncement of the correct rule.

Reply to Points 9 and IX, Pages 43, 102.

The order of June 5th, 1872, found on the books of the company, was of no force or effect. No notice or demand was made under it, according to its terms, nor was the resolution in accordance with the terms of the contracts of subscription, as it did not call for payments in instalments, as provided in the contracts; and under the decision of the Illinois Supreme Court, the bare resolution

created no cause of action, and could set no Statute of Limitations in motion.

Barrett *v.* A. & S. R. R. Co., 13 Ill., 513.

Spangler *v.* Indiana & Ill. Cent. R. R. Co., 21 Ill., 275.

Wear *v.* Jacksonville & S. R. R. Co., 24 Ill., 596.

Cole *v.* Joliet Opera House Co., 79 Ill., 96, 98.

Furthermore, the decree of assessment itself was conclusive on the defendant and the Iowa court to the effect that the right to recover on his contract had not been given by that resolution, and had not existed previous to the decree. The Iowa Supreme Court in its opinion in this case concede that the resolution of 1872 created no cause of action, and bases its decision entirely upon the fact that no call had ever been made previous to the decree of assessment.

Recent decisions of Illinois Supreme Court, where the validity of the decree has been recognized and sustained:

Great Western Tel. Co. *v.* Loewenthal, 154 Ill., 261.

Great Western Tel. Co. *v.* Mears, 154 Ill., 437.

In these cases the defendants established the fact that they were not stockholders.

Respectfully submitted,

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